United States Court of Appeals

for the Second Circuit

APPELLANT'S BRIEF

76-1373

UNITED STATES COURT OF APPEALS

FOR THE SECOND CIRCUIT

DOCKET NO. 76-1373

UNITED STATES OF AMERICA

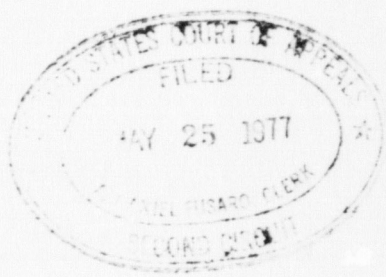
Plaintiff - Appellee,

- against -

FRANK SACCO, BENJAMIN GENTILE,

Defendant - Appellant

ON APPEAL FROM THE UNITED
STATES DISTRICT COURT FOR
THE SOUTHERN DISTRICT
OF NEW YORK



BRIEF OF THE DEFENDANT
APPELLANT FRANK SACCO

FRANK SACCO

Appellant - Pro-Se
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ISSUES PRESENTED FOR REVIEW

1. Did the District court err in not granting defendant-appellant Sacco an evidentiary hearing to determine if illegal evidence obtained by unlawful wiretapping was introduced against him which 'tainted' his trial?

2. Did the Court err when it refused to grant defendant-appellant Sacco's motion for a pre-trial hearing to determine his allegations of illegal wiretapping?

3. Was not the Defendant-appellant Sacco prejudiced by the prosecuting attorney's misconduct relating to matters which went outside the record?

4. Did the Court err when it informed and mistated the legal principles applicable to 3500 and Jencks material to the jury?

5. Did the Court err in allowing bad reputation to be introduced against Defendant-appellant Sacco in the manner that it did?

6. Was it error to delay Defendant-appellant Sacco's sentence beyond the limit permitted by the Constitution and the Federal Rules of Criminal Procedure?

7. Should not the Defendant-appellant Sacco's motion for judgment of acquittal have been granted wherein he was deprived of a fair trial and due process of law?

8. Should not the conviction obtained against Defendant-appellant Sacco be recalled upon the ground that he was refused a fast and speedy post-trial 'taint' hearing?

9. Did the Court violate Appellant Sacco's rights under the Due Process Clause; Rule 52 (b) F.R.C.P.-Plain Error, and committ reversable error when the Court instructed the jury as to a matter of State Law: An erroneous charge in the conspiracy count; and erroneous charge of the substantive violations charged and a directed verdict of guilty?

10. Was it error when the Court relied on a tainted pre-sentence report submitted by State Authorities in imposing the maximum sentence on Defendant-appellant Sacco?

STATEMENT OF THE CASE

This is an appeal by the defendant, Frank Sacco, from a judgment against him, Benjamin Gentile and John Rhines of conviction entered after trial in the United States District Court for the Southern District of New York. The indictment was returned on March 23, 1972, under No. 72 Criminal 332 charging the appellant Sacco in all 8 counts, the defendant Benjamin Gentile in all counts but # 1, and defendant John Rhines in counts 3, and counts 5 thru 8. The first count charged appellant Sacco only with the making of an Extortionate Extension of Credit in violation of Title 18 U.S.C. § 891, 892.

The Second count charged appellant Sacco and Gentile with violation of the Extortionate Credit Transaction Act Title 18 U.S.C. § 891 and 2. The Third count charged all 3 defendants with conspiracy to participate in the use of extortionate means to attempt to collect an extension and extensions of credit from James William Robbins, the debtor in violation of Title 18 U.S.C. § § 891 and 894. The Fourth count charged appellant Sacco and Gentile with using Extortionate means to collect extensions of credit in violation of Title 18 U.S.C. §'s 891, 894 and 2. The Fifth thru Eight counts charged all defendants with using extortionate means to collect extensions of credit in violation of Title 18 U.S.C. §'s 891, 894 and 2.

On the Sixth day of trial, count # 1 was dismissed as to Sacco and on September 26, 1972, the jury trial resulted in the conviction of all the defendants as charged.

The charges centered around two loans made by defendant-appellant Sacco to James Robbins, one for $500.00 on March 16, 1970, and another for $1,000 on May 5, 1970, each claimed to have been made with the understanding that a failure or delay to repay the loans could result in harm to Robbins and his family, and that the various attempts by defendant-appellant Sacco, and his co-defendants Gentile and Rhines to collect the debt in December, 1971, and January, 1972 was allegedly done by use of express and implicit threats of harm.

The defense of appellant Sacco was that the money advanced to Robbins was an investment in the car wrecking business rather than a loan and that Robbins was never put in fear or threat.

A motion was filed by appellant-Sacco to relieve appointed counsel which was granted, (Tr. p 2 thru 4) however, the Court assigned Abraham Solomon to assist appellant. Various other motions were made and ruled upon by the Court the motion for a Bill of Particulars was denied, (Tr. p 14) on the basis that the indictment was sufficient to inform appellant of the particulars of the charge.

Appellant Sacco moved the Court for an evidentiary hearing on illegal wiretaps (Tr. pp 22 thru 26) which was denied based upon the representation of the government that there had been no material gained by wiretap evidence. On September 13, 1972, appellant renewed his motion again for the evidentiary hearing pertaining to the wiretaps which was denied (Tr. p 17).

Motions to dismiss the indictment and motions for directed

verdict of acquittal were submitted and denied. A motion for a post-trial "taint" hearing on the illegal wiretaps was finally granted. There were expanded proceedings on the claim of "taint" but never concluded because the trial Court wanted to wait until other "taint" hearings in other District Courts pertaining to appellant were concluded. However, on February 9, 1976, the evidentiary hearing was dismissed and the "taint" motion denied by reason of appellant Sacco to appear for a final hearing.

On June 9, 1976, appellant-Sacco was sentenced to 20 years on each of the seven guilty counts to run concurrently, but to run consecutively to all outstanding sentences.*

THE GOVERNMENT'S CASE

James Robbins testified that in 1970, he owned and ran Sonny's Auto Parts, an automible wrecking business in Peekskill, on March 17, 1970, (Tr. 123) Being short of money to pay his business rent, Robbins was taken by his friend Tony Iodice to Dooley's Tavern, there to be introduced to Frank Sacco. (Tr. 129-133) at Dooley's, Sacco lent Robbins $500 which was made with a check from Kathryn Fabian, a part owner of Dooley's drawn to Tony Iodice. The check was introduced. (Tr. 133) Sacco told Robbins that he would have to pay $25 a week on the debt untill the $500 was repaid - the weekly due did not reduce principal. (Tr. 135).

* Defendant-appellant Sacco is presently serving outstanding federal sentences of 36 years: U.S.A. v. Sacco, United States District Court, Middle District of Florida, Orlando, Division, 71-53-ORL; 13 years; same court, U.S.A. v. Sacco, 73-79-ORL, 3 years consecutive; U.S.A. v. Sacco, United States District Court, District of Maryland, 71-0371-K, 20 years, Westchester County Court, N.Y. Indictment No. 649/70, 8 years consecutive making it a total of 64 years with the sentence imposed in the present case.

Over the next few months, Robbins met his weekly payments, dropping them off in envelopes at Dooley's. Once, Gentile stopped by Sonny's Auto Parts and picked up a payment for Sacco. (Tr. 135-137)

Sometime in May, 1970 Gentile drove into Robbin's junk yard in a late model LTD station wagon that was, Robbins presumed, riddled with bullet holes. Gentile told Robbins that Sacco wanted Robbins to "dispose" of the car. Robbins declined to do this. In the same conversation, Robbins asked to borrow another $1,000. Gentile said he would take the request up with Sacco. (Tr. 147-148)

One week later, Gentile returned with Sacco in the same alleged bullet-marked car. Sacco lent Robbins $1,000 and left the car for disposal.* Sacco told Robbins that he would have to pay $75 a week on the total $1,500 borrowed untill repayment of the principal. Again the weekly due did not reduce the debt. (Tr. 169-170).

For the next two months, Robbins made his weekly payments to Gentile, falling behind in some instances. On one occasion when Robbins did not have any money to give Gentile, Robbins remarked that he was worried about not being able to keep up to date because he would not want

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* David Van Tassel testified that he was present when the bullet-marked car was left and drove Gentile and Sacco back to Yonkers. (Tr. 429-437) Carl Fierro testified that Robbins brought a 1969 station wagon, Ford LTD to his wrecking yard in May, 1970. Fierro dismantled some of the parts and Robbins took what remained back to his yard. (Tr. 443-444) Martin Riggen, an FBI agent testified that on September 8, 1972, he took possession of a car door from Fierro.(tr. 465) The vechile identification number on the door matched that of a car Patrick Battista testified he sold to Sacco. (Tr. 487)

anything to happen to himself or his family. Gentile replied, "Well, you don't have to worry about that. I will tell you in advance if something like that is going to happen." (Tr. 174)

Robbins stopped making payments in late summer, 1970 and although the $1,500 debt remained outstanding he did not hear from Sacco or Gentile until December, 1971. (Tr. 177-178) Around this time, Robbins got a message from his wife about a meeting he should attend at Benny's Charcoal Pit, Peekskill concerning a $9,000 debt of his.*

At Benny's Charcoal Pit on December 6, 1971, Robbins met with Sacco and John Rhines.** Sacco and Robbins discussed the amount due on the loan. At one point, Robbins interjected that the FBI was around to see him. Sacco's response was - "I'm not scared of them, They're scared of me." (Tr. 185) Sacco then took a walk with Robbins during which he instructed Robbins to pay $1,500 by January 1, 1972, and $1,000 later, and to pay, until the debt is cancelled, $125 weekly. After Sacco and Robbins rejoined Rhines at Benny's, Sacco told Robbins that he would have a contract drawn which would state that they were partners. He also told Robbins that Rhines would pick up the weekly $125. (Tr. 185-188)

* Barbara Robbins, James Robbins wife testified that she received a telephone call from Gentile about a $9,000 debt of her husband and another call to set up a meeting. (Tr. 512).

** William Walsh, a defense witness called by Sacco testified that Robbins contacted him before the December 6, 1971, meeting and reported his difficulties with Sacco (Tr. 860).

On December 10, 1971, Robbins returned to Benny's Charcoal Pit and met with Rhines, who was accompanied by John Hockbarth.* (Tr. 192) A telephone call came from Sacco and Robbins spoke to him. Robbins told Sacco that he was in fear because of his inability to pay back his debt. Sacco told him that as long as he met his weekly payment he had nothing to worry about. (Tr. 194) Resuming his discussions with Rhines, Robbins told him that he thought Benny Gentile was a nice guy. Rhines replied, "Yeah, but he's rough when he wants to be." (Tr. 195) After lunch Robbins handed Rhines an envelope with $125. (Tr. 196)

The first week of January, 1972, Rhines went to Robbin's junk yard to pick up a current payment and a week's arrears. At this meeting, Robbins "blew his top" - "I don't want no trouble from this God damn house. I don't want nothing to happen to my wife, my kids, and myself," said Robbins. (Tr. 202) Rhines replied that he had stopped the "rough boys" from coming up to see him because he felt that Robbin's difficulties were real. Rhines also said that Robbins would have no problems if he met his weekly payments. A meeting was then set up for the following week at Benny's Charcoal Pit. (Tr. 202-203)

At this meeting, Rhines collected $200 from Robbins. (Tr. 204)

The government then put a series of questions to Robbins about Sacco's reputation and Robbin's state of mind at various times, the answers to which were admitted over defense objection and may be summarized as follows:

* John Hockbarth, who worked for Rhines, testified for the government about his lunch with Rhines and Robbins at Benny's Charcoal Pit. Hockbarth testified that at the meeting Rhines made no threats and that he recalled no discussions about loans or payments. (Tr. 599)

Robbins never gave any thought as to what the consequences would be of his failure to repay at the time he borrowed the $500.* (Tr. 217) When he borrowed the $1,000 he had heard Sacco's reputation in the community to be that of a man who wasn't the best of a person to be dealing with (Tr. 218), and that he had also heard that Sacco was a "violent man." (Tr. 219)

Louis Katler, an investigator with the State liquor authority, and John Coets, a special agent for the Bureau of Alcohol, Tobacco and Firearms, testified about their observations at Dooley's Tavern in April, 1970 that suggested that Gentile had an interest in Dooley's. (Tr. 344, 346; 359-360)

Kathryn Fabian testified that she and Sacco shared the ownership of Dooley's in 1970, and that on March 17, 1970 she wrote out the $500 check that was eventually given to Robbins. (Tr. 373. Sacco told her the check was for cleaning up the place. (Tr. 375).

Anthony Iodice confirmed Robbin's testimony that they met with Sacco at Dooley's Tavern on March 17, 1970. (Tr. 390) On his cross examination, Sacco elicited Iodice's hearsay knowledge of the second $1,000 loan. (Tr. 410)

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* Count 1 of the indictment that charged Sacco with making an extortionate $500 loan on March 17, 1970 was dismissed at the end of the government's case.

Carl Amadits, an FBI agent observed the Sacco-Rhines-Robbins meeting at Berry's Charcoal Pit on December 6, 1971. He testified to overhearing pieces of conversation of which one item was Sacco's statement to Robbins that Robbins owed him 1500.(Tr. [illegible], 543) On Sacco's cross examination, Amadits described Robbin's demeanor when with Sacco as "very serious" and "solemn". Amadits would not state, however, that Robbins was shaking or stammering out of fear at the time. (Tr. 587)

FBI agents Michael Hayn, Stephen Barnett, Bob Reutter, and Julius Bonavalony testified about their observations of the various meetings occurring in December, 1972 and January, 1972. (Tr. 616 et seq., 641 et seq., 677 et seq., 751 et seq.) Sacco's cross examination of Reutter elicited that Robbins expressed fear of Sacco to the FBI and that he was "shaking" before his December 10, 1971 meeting with Rhines. (Tr. 692-693)

Cedrick Kuhl testified that he was an actuary employed by the Treasury Department. He computed the interest per annum on a $500 loan at $25 per week and on a $1,500 loan at $75 per week to be 260 percent. (Tr. 754-765)

The government read parts of Sacco's grand jury testimony which may be summarized as follows:

Frank Sacco testified before the grand jury that his involvement with Robbins all began as a result of prior negotiations he, Tony Iodice, and Lou Ruggiero were having with another for the purchase of a large junk yard adjacent to Robbin's. Iodice suggested that a pile

of junk cars on the lot could be sold to Robbins at a substantial profit. (Tr. 782-784) Eventually Iodice advanced $500 to Robbins for his business. (Tr. 786)

When Sacco finally met Robbins at Dooley's Tavern, they discussed a partnership arrangement of some kind, but no agreement was then reached. However, Sacco reimbursed Iodice at that time for his advance to Robbins. (Tr. 786)

A short while later Sacco struck an agreement with Robbins and invested another $1,000 which made him an equal partner to the extent of his investment. (Tr. 796) Sacco was to be paid $75 per week as his share of the profits, but if there were no profits, nothing need be paid. (Tr. 796)

In December, 1971 Sacco, after having been out of town for 16 months, met with Robbins to discuss what was coming to him. It amounted to $2,500 of which Robbins agreed to pay $1,500 immediately and the balance when he could pay it. At this December meeting Robbins told him that FBI agent James Walsh had been to see him about the money Sacco had advanced. Sacco told Robbins to tell the truth and also told him that he would have his lawyer Leon Greenspan prepare an agreement to reflect their prior partnership arrangement. (Tr. 794) Sacco admitted having a reputation for being in the business of money lending. (Tr. 796)

Leon Greenspan, an attorney, testified that in the spring of 1971 Sacco spoke to him about his relationship with Sonny's Auto Parts. At that time Sacco said he had no present ownership interest in the business. (Tr. 800)

SACCO'S DEFENSE

Fifteen witnesses were called by Sacco to establish that he invested in Sonny's Auto Parts and that he was actually a partner; that Robbins was never in fear of Sacco; that other Sacco lenders were never in fear of him; and that FBI agent Walsh spread word in the community that Sacco was dangerous and pressured Robbins into an untruthful claim.

Thus, Anthony Trimarco, who had worked for Frank Sacco's brother testified about a conversation he had with Robbins in the spring of 1970 in which Robbins stated that Sacco had invested in his business. In that same conversation Robbins told how much he liked Sacco. Trimarco also testified that he had borrowed money from Sacco and was not in fear. (Tr. 970, 994) Frank Squires testified that Robbins, at the end of March 1970, told him that Sacco was about to become his partner. (Tr. 1010, 1014) Phillip Sylvester testified that he had a conversation with Robbins at J Deas Auto Wreckers - Sacco's brother's place of business - in the summer of 1970 in which Robbins stated that he was in partnership with Sacco.* (Tr. 1050) Frank Armento, Frank Sacco's nephew "Little Frankie", testified that Robbins told him he was in partnership with Sacco. (Tr. 1204) In the latter part of 1971, Robbins complained to Armento that the FBI were pressuring him to supply evidence against Sacco. (Tr. 1249) Anthony Iodice testified that Robbins never

* Sylvester also testified about how he stole a car for Robbins and received $50 from him for this. (Tr. 1055)

(Tr. 1268)

Some of Sacco's efforts to establish his defense were thwarted by rulings which precluded him from eliciting certain facts. Thus, he was not permitted to establish on his examination of Peter Arnone that the pressure Walsh put on him was so enormous that it drove him out of town. (Tr. 946) Nor was Sacco permitted to elicit from Arnone that Walsh told him that Sacco was dangerous and violent and that he should fear for his life. (Tr. 947) Questions concerning Walsh's harrassment of the witness Trimaraco were precluded. (Tr. 990) Sacco refrained from calling Carlton Miller, who would have testified about Sacco's good reputation, because Judge Gagliardi ruled that the government could ask whether Miller had heard about Sacco's prior convictions. (Tr. 1032) The Court barred Sacco from asking Kathryn Fabian questions about Walsh's harrassment of her and of her lack of fear of Sacco. (Tr. 1078, 1083)

Bart Ruggiero confirmed the existence of a junk yard adjacent to Robbin's property which he was thinking of purchasing. (Tr. 960) Doris Ray, a Dooley's Tavern bartender in 1969-1970, testified that she never received any envelopes or payments of money on Sacco's behalf while working at the tavern. (Tr. 1075) FBI agent William Walsh testified that Robbins called the FBI office early in December, 1971, and Walsh went to see him on December 6, 1971, before his meeting with Sacco. (Tr. 860

He also testified that in September, 1971 he went to see Robbins and showed Sacco's picture to him (Tr. 868) In that earlier interview Robbins tole Walsh that there may have been Sacco loans to him, but he did not want to talk about it.(Tr. 870) James Robbins was recalled as a defense witness and admitted that he borrowed $5,000 from one Marion Booth in February, 1971.(Tr. 1291-1292)

Sacco then read Grand Jury testimony of his pertaining to the allocution of his Fifth Amendment right not to testify and to have counsel to assist him and his waiver of those rights.(Tr. 1261)

After Judge Gagliardi ruled that if Sacco testified, his prior Federal convictions in Baltimore and Orlando of similar acts could be used to impeach, despite pending appeals in both cases, Sacco rested.

RHINES'S DEFENSE

Essentially, Rhines testified that he entered the picture in December, 1971 with no knowledge of the prior relationship between Sacco and Robbins; that he gleaned from the Sacco-Robbins conversation of December 6, 1971 that they had a partnership that was about to be dissolved with a payment of $1,500 by Robbins to Sacco; that legal papers were to be drawn to this effect; that he conveyed a few messages to Robbins from Sacco and received a few payments on Sacco's behalf, but he made no threats and had hardly a concern about the whole thing.(Tr. 1107, 1113-1117, 1125, 1165) Rhines testified also that he ran a small advertising agency and antique shop. He had no prior arrest

record and was married with three children. (Tr. 1087-1088)

ISSUE NUMBER ONE (1)

THE DISTRICT COURT ERRED IN NOT AFFORDING APPELLANT SACCO A FULL AND COMPLETE ALDERMAN HEARING TO ESTABLISH "TAINT" IN A SUBSTANTIAL PORTION OF THE GOVERNMENTS CASE AGAINST HIM

Between September 15, 1969, and April 6, 1970, for a period of seven months, the District Attorney of Westchester County, White Plains, New York, pursuant to a court order conducted electronic surveillance and eavesdropping against defendant-appellant Sacco which resulted in the interception of approximately 15 thousand calls which were recorded on 450 tapes.

In the case at bar, the periods of time which it is charged in the indictment, appellant Sacco committed the acts constituting the crimes charged, such acts being included in the period of time when the illegal electronic surveillance and eavesdropping was being conducted against him.

That since the inception of the illegal wiretapping and eavesdropping, appellant Sacco was violated of a federal probation that had previously been imposed and sentenced to a term of two years. He also was indicted and convicted in the United States District Court of Florida, Orlando, Division, Orlando Florida, and the United States District Court for the District of Maryland, Baltimore Maryland, on charges of violating sections 892-894 of Title 18, U.S.C. He was also indicted and convicted by the state of New York on charges of Criminal Usury.* (Cont next page)

THE FACTS

Prior to trial, appellant Sacco filed a supplemental motion for discovery and inspection dated 7-3-72 wherein he requested the results of any electronic surveillance, eavesdropping or wiretapping used by the local, State, government or any law enforcement agency in the gathering of evidence which was to be used in evidence or which provided leads to the indictment or matters which were to be used in evidence or which were used in evidence before the Grand Jury in this case.(Tr. pp 22-23)

The government responded that there were none and appellant Sacco represented to the Court that there were leads that came from the wiretaps and knew that for a fact.(Tr. p 23) On the strength of the representation of the government, Judge Gagliardi denied appellant Sacco's motion for the hearing.

On Spetember 15, 1972, appellant Sacco renewed his motion for the evidentiary hearing pertaining to the wiretaps and the Court responded by stating:(Tr. p 17)

> THE COURT: I have ruled on that. I refuse to make my ruling on that. I received the representation of the United States Attorney that there has been no material gained by wiretap evidence, if it should come out during the course of the trial some indication, that maybe some evidence was obtained throughillegal means, you have the right to renew your application, and we will approach it from there.

* United States v. Sacco, Middle District of Florida, 71-53-ORL-CR
United States v. Sacco, District Court of Maryland, 71-037-K
People v. Sacco, Westchester, Court.N.Y. Indictment 649/70

The Court denied the motion on October 2, 1972, following his conviction, appellant Sacco renewed his "taint" claim, the predicate for the motion being other post-trial "taint" hearings were granted and scheduled before the Federal Courts in Baltimore, Maryland and Orlando, Florida, where he had been convicted of simular charges.* The motion was again denied and appellant Sacco filed a petition for a writ of Mandamus in this Court directed against Judge Gagliardi seeking an order compelling him to grant the evidentiary hearing. However, before the petition could be heard, Judge Gagliardi reversed himself and granted the hearing thus mooting the petition for the Writ of Mandamus.

After the granting of the hearing, there were continous adjournments by the Court in conducting it in that the Court wanted to wait and see what the results of the "taint" hearings in the other Federal Courts were.

Appellant Sacco's "Taint" hearing in the District of Maryland, Baltimore, Maryland, commenced on November 6, 1972, on an arguendo basis that the New York State wiretap was unlawful and it continued up to November 17, 1972, at which time it was adjourned to settle the legal Question of whether or not appellant Sacco was entitled to listen to the tapes p[illegible] the fact that the New York State Authorities refused to turn the tapes over because they regarded the matter highly sensitive for two reasons, first they felt that disclosure of the tapes would endanger

* Middle District of Florida; U.S. v. Sacco, 71-53-ORL
District of Maryland; U.S. v. Sacco, 71-0371-K

witnesses and second, they felt disclosure would have jeopardized ongoing and future investigations. See Baltimore post-trial hearing transcript dated November 17, 1972.

Without having been given the opportunity to review the logs and listen to the tapes in the Baltimore hearing, appellant was still able to obtain testimony for the first time that information from the Westchester wiretaps was disseminated from the state authorities to the federal authorities which involved witnesses that testified on behalf of the government in the case at bar. Baltimore post-trial (Tr. Nov 14, 1972. pp 1065-1073)

While the motion pended in Baltimore, a post-trial hearing got under way in Fort Myers, Florida, before Judge Noal P. Fox and commenced on January 22, 1973. This hearing proceeded on an arguendo basis that the New York State wiretap was unlawful. Mr. Claude Tison, the attorney for the government represented to the Court that the government have taken the position that the United States and no agent of the United States has ever been in possession of any conversation of appellant Sacco or any conversation taken from his premises, and by "conversations", the attorney used the word in the broadest sense to include not only direct tapes, but also transcripts, logs, summaries, memoranda, or anything else made from any intercepted conversations. Ft. Myers (Tr. p 1), January 18, 1973). Had the attorney for the government read the transcripts of the Baltimore hearing, he would never had made that representation to the Court.

[illegible] Judge Kaufman suspended the hearing on January 23, 1973, when the government informed the Court that the New York State Authorities refused to turn over the wiretap material for the same reasons given in Baltimore.

While the government and appellant Sacco were litigating the issue in Baltimore, a hearing was conducted by Judge Gagliardi in this case on April 4-5th, 1973 at which time the Court wanted to determine the constitutionality of the New York wiretaps.(Proceedings of April 4, 1973, p 7)

At the April 5th, 1973, proceeding, pp 2-3, Edward M. Shaw, the Assistant United States Attorney advised Judge Gagliardi that the Westchester District Attorney's office had changed their mind and would release the tapes and logs to the Baltimore Court. The hearing was then adjourned to give appellant Sacco the opportunity to listen to the tapes and it was settled that when the hearing resumed, the constitutionality of the tapes would be resolved first and then the question of "taint".

After April 5, 1973, but before appellant Sacco came into possession of the tapes, he moved for the appointment of a conservator to maintain custody of them - to prevent any tampering or destruction - and for the appointment of an expert in electronic sound detention to meet any future claim of tampering. (Supp. Appendix-Exhibit, C & D)

On June 19, 1973, Judge Kaufman, District of Maryland, ordered the government to provide the logs and tapes to appellant Sacco and to come up with a plan for doing so by June 25, 1973. (Supp. Appendix-Exhibit E) The government, however, did not turn over the duplicate tapes-

some 439 reels untill the early part of January, 1974.(See letter from Judge Frank A. Kaufman dated, November 30, 1973. Supp. Appendix, Exhibit F)

For the next nine months, appellant Sacco was confined in the Administrative Segregation unit of the Lewisburg Penitentiary, Lewisburg, Pa., at which time he listened to approximately 15,000 thousand intercepted conversations.

In the case at bar, the government produced 19 prosecution witnesses at trial which 7 of them were directly or indirectly associated with the conversations that were intercepted by the Westchester Authorities. The names of these persons were supplied to the Court in a reply affidavit submitted by appellant Sacco in October, 1974 (Supp.Appendix-Exhibit U)

While listenting to the tapes and reviewing the logs, it came to appellant Sacco's attention that there may have been tampering with the tapes and he filed motions in all three Federal Courts for a hearing and appointment of an expert to determine if the tapes had been tampered with. A stipulation was entered into before Judge Kaufman that the hearing would be granted and conducted before Judge Gagliardi and that appellant Sacco would be bound by Judge Gagliardi's finding in all of his outstanding Federal Cases.

Prior to the tampering hearing, being commenced, appellant Sacco filed voluminous motions with Judge Gagliardi which included a proffer with respect to the witnesses he wanted to subpoena to testify at the tampering hearing and the "taint" hearing. (Supp. Appendix-Exhibit V)

THE TAMPERING HEARINGS

On November 27, 1974, a conference was held before Judge Gagliardi on appellant Sacco's claim of tampering at which time Sacco attempted to resolve the "taint" issue as well, wherein the following dialogue ensued:

THE COURT:	I tell you right now I am not taking the taint up right now. You are already in the middle of a hearing before Judge Kaufman in Baltimore on the issue of taint.
DEFENDANT SACCO:	The issues there are entirely different.
THE COURT:	It may be. Thats all you have sent back to me for by Judge Kaufman.
DEFENDANT SACCO:	When would your Honor hold a taint hearing?
THE COURT:	After you have concluded the hearing in Baltimore, I am not going to do them simultaneously. If you are entitled to a taint hearing you will get one here. [Proceedings, Nov. 27, 1974] pp 13-14

Prior to the commencement of the tampering hearing, appellant Sacco applied to the Court of Appeals for the Second Circuit for a Writ of Mandamus to require Judge Gagliardi to grant him a prompt taint hearing. The application was denied on December 16, 1974. Appellant Sacco

also filed the following motions which were never ruled upon by Judge Gagliardi:

1. MOTION FOR AN ORDER OR THE ISSUANCE OF A SUBPOENA DIRECTED TO THE DISTRICT ATTORNEY OF WESTCHESTER COUNTY TO PRODUCE CERTAIN DOCUMENTS AND MATERIAL PERTAINING TO THE HEARING WITH REGARDS TO TAMPERING WITH REGARDS TO TAMPERING AND CUSTODY AND CONTROL

2. MOTION FOR AN ORDER DIRECTING THE WESTCHESTER AUTHORITIES TO PRODUCE AT THE TAMPERING HEARING THE HEREIN REQUESTED INFORMATION AND ITEMS (Supp. Appendix-Exhibit)

Also, prior to the hearing, appellant Sacco submitted a list of irregularities that appeared on 126 of the tapes which he wanted an expert to examine to determine if they were tampered with or not. This list was submitted on January 6, 1975 and marked exhibit 19 for identification. (Supp. Appendix-Exhibit)

This list was rejected by the Court as being to costly for an expert to examine and appellant Sacco was offered the opportunity by the Court to pick out only six (6) of the tapes to be examined by the expert otherwise the expert would not be appointed. A less inclusive list was prepared and furnished to the government pursuant to a stipulation, entered into on January 7, 1975 between appellant Sacco and the government. (Proceedings Jan. 7, 1975 pp 271 thru 279)

At the hearing on January 6, 1975, Eugene Cherico, a Westchester County Assistant District Attorney, while being questioned with respect to any alterations, deletions or tampering with the tapes was asked the following questions:

Q. Prior to your office turning the tapes and logs over to the District Court for the District of Maryland, do you recall refusing to turn them over for the reasons given because future prosecutions would be hampered and there was a potential threat to some witnesses?

A. Uh, yes, confidently. (Proceedings, Jan 6, 1975 p 41)

Q. What made your office change their mind in turning over the tapes and logs?

A. I think we evaluated several factors, and one of the factors we evaluated was whether any of our pending cases were going forward which they were not, and also there appeared to be a lessening of the risk to the witnesses in the case which we evaluated also, and also it became fairly apparent that the District Court in Maryland was being fairly strong in their insistence upon obtaining the tapes.

Q. Approximately how many conversations in the tapes would you say that your office considered a threat to potential witnesses?

A. Numerous conversations.

MR. SHAW: Excuse me.

THE COURT: Yes, sustained.

MR. SACCO: It is very important, your Honor, because my argument is they deleted these conversations from the tapes and that's why they turned this over to me at a later date.

THE COURT: Sir, I don't think the question is relevant, really.

MR. SACCO: It certainly is relevant, your Honor.

THE COURT: No, it goes to motive, it doesn't go to facts. Next question.

Q. How many conversations in the tapes did your office consider to be future prosecutions?

MR SHAW: I object to that, your Honor as irrelevant.

Mr. Corbi: Sustained.

Q. Were there any records kept by the District Attorney's office of Westchester County which would indicate what witnesses would be -- -- that I would be a threat to?

MR. SHAW: I object to that.

THE COURT: Sustained. (Proceedings Jan. 7, 1975 pp 42-43)

The foregoing questions were propounded to the witness due to the fact that the Westchester officials had previously refused to turn the tapes and logs over to the Courts for a period of approximately 13 months which would have given them sufficient time to delete conversations that would have proved "taint".

Mr. Cherico's testimony revealed that 8 tapes that came out of the original wiretap order -- September 15, 1969 were missing and that another 37 tapes were never brought to the Court for sealing as per the requirements of Title 18 U.S.C. § 2518 (8) (a). (Proceedings January 7, 1975 pp 106 thru 109 and pp 25-27)

The revelation of the missing tapes and the failure to have the tapes sealed was discovered in May, 1974, when Cherico's office began duplicating the tapes for appellant Sacco.

Joseph Di Scioria, an investigator with the Westchester District Attorney's office testified that he was a electronic technician and that he was familiar with the tapes and equipment in the matter before the Court. He attempted to give innocent explanations of the irregularities cited by appellant Sacco and while he was successful in a very few, most of the time he wasn't. One good example was that he could not explain

to the court why the dates on the logs ranged from January 5th, 1970 to March 5th, 1970, nor could he account for approximately 26 tapes that were made during that period of time, which are presently missing.(See Proceedings January 6, 1975, pp 154 thru 159)

Another good example was that he could not explain why the same monitored conversation appeared on different tapes covering different dates and on the same instrument. (Jan. 6, 1975 p 141)

During the examination of Mr. Di Salvio, the revelation of a "Pen Register" was brought out for the first time and appellant Sacco moved the court for production of the tape in order that he could compare the outgoing calls with the calls on the logs which would have determined if all the conversations on the tapes were turned over to him. (Proceedings of Jan. 6, 1975 pp 146-147)

William McKenna, a Westchester Administrative District Attorney testified that for the first month of the wiretapping, it was exclusively a State Police operation and that the actual tapes were kept in the State Police Barracks at Hawthorne New York.(Proceedings Jan. 6, 1972 p 253) Mr. McKenna testified that a quantity of the tapes had remained in the evidence room at the State Police barracks and that approximately 8 of the tapes were missing. (Hearing Jan. 6, 1972 pp 261-2) He also confirmed that the tapes were never sealed.

Mr. McKenna was questioned by appellant Sacco concerning missing logs and tapes pertaining to a semi-coin telephone that was tapped which was one of the phones included in the wiretap orders and he admitted that the return made to Justice Beichein on April 16, 1970, indicated that there were conversations recorded on the semi-coin instrument but it was

his recollection that there weren't any.(Hearing Jan.6, 1972 263)*

Further examination of Mr. McKenna with respect to a gap in time on the logs from January, 1972 to March, 1972, revealed no explanation except that it was being researched.(Hearing Jan 6, 1972 p 268)

Also, Mr. McKenna could not give an explaination as to the interception of conversations on another telephone included in the wire tap orders which had a pick up (trunk line on the same instrument.(Hearing Jan. 6, 1972 pp 264 thru 256)

When the irregularities on the tapes could not adequately be explained by Mr. Delorio, the Westchester County electronic technician, appellant Sacco renewed his motion for the appointment of the electronic expert which was granted.

That on February 19, 1975, Mr. Matt R. Weiss, the expert picked by the Court submitted his report of the examination of the 7 tapes on a "quick look" analysis and stated that reasonable explainations could not be found on certain tapes, thereby raising serious questions regarding their authenticity. Mr. Weiss also went on in his report to the Court to say that it is possible that some of the ambiguities could never be resolved and the resolution of others might require a more in depth examination.

Mr. Weiss made it clear in his report that the results of the limited examination of the tapes were just opinions based upon measurement

*No tapes or logs from this instrument were ever produced.

data and on professional judgment and should not be considered as being conclusions.

That a hearing was held on March 5, 1975 in this Court wherein Judge Gagliardi inquired of Mr. Weiss if he found any tampering of the tapes and Mr. Weiss's reply was that on the physical tapes themselves, assuming that the tapes he had were in fact the original, it was his opinion that there was no tampering. See, page 4 of March 5, 1975 transcript.

Judge Gagliardi, inquiring further of Mr. Weiss from the report submitted to the Court on February 19, 1975, asked about Item No. 5 which had been represented to the Court by Assistant District Attorney, William McKenna, to have been a virgin tape, whether or not in his opinion the tapes had been previously used. Mr. Weiss testified that the tape had been previously used and there was no way of determining how many times. (p 5 of transcript).

With respect to the virginity of the tapes in item 5 and possibily others. Mr. McKenna stated to the Court that the representation he made to bulk tapes erasing was made to him by a former trooper who is now on his staff and that the practice of the State Police was to ship tapes that had been used to his office from Albany, New York, and that the assement of a particular tape being virgin tape was based upon his own personal knowledge of his practice once his office got into the investigation. (P 7 of transcript)

The examination of Mr. Weiss by defendant determined that ifthe tapes examined by him were copies and not originals, it was possible that the entire tapes were dubbed. (p 11, transcript)

With respect to item 1 of the report submitted to the Court by Mr. Weiss, Mr. Weiss testified that the failure of being furnished the recording machines on which the tapes were made, made it impossible to determine whether or not the original tapes had been tampered with (p 13 of transcript)

With respect to the authenity of the tapes examined by Mr. Weiss the question was put to him as follows: p 13 of transcript

QUESTION: Is it correct to say that in your opinion as an expert the authenticity of the tapes have not been proved?

ANSWER: Yes, that's correct. Insofar as it is not possible to determine without at least examples of the machines that did actually record these tapes, that they were recording on such machines.

A further question put to Mr. Weiss with regards to the authenticity and tampering issue failed to substantiate his earlier answer to Judge Gagliardi that it was his opinion that there was no tampering. The question and answer is as follows: (P 13, 14 of transcript)

QUESTION: Is it further correct to say that unless the machines - the original machines are produced, it is impossible to establish the authenticity of the tapes examined in item 1 and whether or not they have been tampered with?

ANSWER: Well, I could never say whether or not they had been tampered with...if I find strange characteristics which are not attributable to the machines on which the tape must have or was alleged to have been made, then there is a possibility that the tape is a copy, a dubbing with an implication of possible alteration. But I can never say that alteration actually took place.

It is submitted by defendant that the report and testimony of Mr. Weiss has failed to authenticate the tapes examined by him thus leaving reasonable doubt as to whether or not the tapes were tampered with or not.

On March 19, 1975, appellant Sacco submitted to the Court a memorandum and proposed findings of fact with respect to the tampering hearing. While he received a reply from the government, the Court never commented on nor acted upon it (Supp. Appendix-Exhibit)

That on July 28, 1975, approximately 6 months after the tampering hearing was conducted, Judge Gagliardi handed down a memorandum opinion which pointed out some difficulties he had to make a meaningful decision. Judge Gagliardi stated in his opinion(Supp. Appendix K p.2)

> "Having concluded the hearings and having reviewed the applicable law, I now seriously question the possibility of making a meaningful, independent finding on the tampering issues. I believe that the stipulation, pursuant to which the hearings before me were conducted, was based upon a faulty assumption, namely, that the tampering issues could be effectively severed and determined seperately from the ultimate question of 'taint' (p.2)

Judge Gagliardi acknowledged that the adversary character of the taint hearing as set forth in ALDERMAN V. UNITED STATES, 394 U.S. 165 (1969), cannot be maintained in some cases without the availability of the tapes, thus mandating suppression. See: UNITED STATES V. HUSS, 482 F.2d 38 (2d Cir. 1973).

The Court determined that the resolution of the issues in the instant matter was governed by the opinion in UNITED STATES V. GAGCIL/SO DE LA VEGA, 489 F.2d 761 (2nd. Cir. 1974), wherein the Court held there was no evidence that the missing tapes had been destroyed under suspicious circumstances and because the government had met it's burden by

that certain but otherwise people were going to be present. (Brf. pp

making a showing and prove beyond a shadow of an independent, untainted

source.

Judge Gagliardi determined that he could not make a meaningful independent determination of the tampering issue because the strength of the proof of an independent source had to be weighed against the suspiciousness of the circumstances surrounding the loss of the tapes.

It is submitted by appellant Sacco that the issue of tampering, missing tapes and the sealing of the tapes was completely unresolved. Judge Gagliardi's conclusion memorandum (Supp. Appendix-Exhibit K) clearly and definately supports the aforementioned unresolvedness of said issues.

It would appear that the concluded admission by the Westchester Authorities in failing to seal a certain number of the tapes and the grave delay in returning the other tapes to the authorizing judge for directions on sealing and custody would require reversal.

Title III of the Omnibus Crime Control and Safe Street Act of 1968, 18 U.S.C. 2510 et seq, prescribed specific and detailed procedures to ensure careful judicial scrutiny of the conduct of electronic surveillance and the integrity of its fruits.

In UNITED STATES V. GIGANTE, et al, No. 1116 September Term 1975, decided June 22, 1976 (2nd. Cir), this Court was called upon to determine whether the requirements of 18 U.S.C. § 2518 (8) (A) should be strictly construed and its answer was in the affirmative.

This Court in GILBERT in rejecting the government's argument that the appellee's were unable to present any evidence of actual tampering with the tapes responded:

> "To demand such an extraordinary showing however would vitiate the Congressional purpose in requiring judicial supervision of the sealing process. Tape recorded evidence is uniquely susceptible to manipulation and alteration. Portions of a conversation may be deleted, substituted or re-arranged yet, if the editing is skillful, such modifications can rarely if ever be detected...(4333)

The Court of Appeals in re: PEOPLE V. NICOLETTI, et al, decided June 5, 1974, reversed the conviction upon the ground that the sealing requirements by the people were not strictly construed to prevent tampering and protecting the chain of custody. The Court held that the purpose of the sealing requirement was at least three-fold, first, to prevent tampering, second, to prevent alterations and editing and thirdly, to protect the confidentiality of the tapes.

The significance of the disappearance of the tapes and the non sealing of them cannot be understood in this case. To compell a party who objects to the use of evidence obtained as a result of unlawful wiretapping to go forward with a showing of "taint", ALDERMAN, supra and then to withhold from him the means or tools to meet that burden, is to create an absurdity in the law. It must be recalled that Congress specifically provided that under no circumstances may electronic surveillance tapes - even those obtained legally - be destroyed for a period of 10 years. Section 2518 (8) (A).

THE TAINT HEARING

After the tampering hearing was concluded before Judge Gagliardi and prior to the memorandum opinion being handed down by him on that matter, defendant-appellant Sacco's taint hearing before Judge Noel P. Fox in Tampa Florida was conducted from April 7, 1975 through June 12, 1975, and while that hearing was concluded, no opinion was ever rendered due to the fact that defendant-appellant departed from federal custody.

Judge Fox limited the evidence to the Orlando case as in Baltimore and the proceeding with respect to the legality of the wiretaps was conducted on an arguendo basis that they were illegal.

It was on June 16, 1975, that appellant Sacco escaped from federal custody. On July 9, 1975, while he remained a fugitive, Sacco sent a letter to Judge Kaufman with copies to Judge Fox and Judge Gagliardi stating that his "departure" would be explained in "the very near future." (Supp. Appendix-Exhibit L) The letter gave Sacco's Maryland attorney as a return address.

On November 10, 1975, an attorney with the Justice Department wrote to Judge Gagliardi requesting that Sacco and Gentile be sentenced, claiming that Sacco had waived further hearings by becoming a fugitive. Judge Gagliardi then scheduled a final hearing on the taint motion. Notice was sent to Sacco's attorney in the Maryland action and to Howard Jacobs, Gentile's attorney. A final date of February 9, 1976, was set

On January 30, 1976, Mr. Jacobs advised the court that Sacco had called him the previous about the scheduled hearing. On the evening of February 8, 1976, Sacco again called Mr. Jacobs and discussed matters concerning the projected hearing. On February 9, 1976 Sacco failed to appear.

The court then denied appellant Sacco's taint motion (Proceedings Sept 9, 1976 p.2) Mr. Jacobs, obtained an adjournment to prepare for Gentile's hearing. This hearing was eventually rescheduled for March 30, 1976.

On February 27, 1976, appellant Sacco was apprehended by federal authorities and he promply moved for reinstatement of his taint hearing which was denied. (Supp. Appendix Exhibit I).

THE GENTILE HEARING

Without appellant Sacco present at the hearing, Gentile and the government stipulated to the testimony taken at Sacco's taint hearings in Baltimore - 1705 pages - and Orlando 2626 pages *

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* It must be remembered that Judge Fox at the Florida hearing limited that hearing to the Florida case only.

The thrust of Mr. Jacobs argument was that the State Liquor Authority was given wiretap information from the Westchester County District Attorney's office which led them to Dooley's which alone was sufficient to taint the government's case. (Proceedings March 30, 1976 pp 4 thru 13)

William J. Walsh, an F.B.I. agent called as a witness on behalf of Centillo testified that he received a copy of a report of the State Liquor Authority that was in the possession of Jimmy Nelson, a police officer of the Peekskill Police. (Proceedings March 30, 1976 p 21) When reserved with the question as to whether or not he learned from the State Liquor Authority that a pellant-Sacco had loaned money to Kitty Fabian, Mr Walsh's answer was that he had no recollection and when he was confronted with his testimony given in Orlando, page 459, he replied "I'm just going to say I dont remember any part of it". (Proceedings March 30, 1976 p 26 thru 28)

Mr. Walsh's same hostility remained throughout his entire examination and most of the time, he was fencing with Mr. Jacobs rather than giving direct answers. Mr. Walsh's credibility was indeed in danger and in rehabilitating this, he gave some ground by admitting that some of the evidence admitted at the trial came from the State Liquor Authority. For instance, a $500.00 check drawn by Kitty Fabian to Anthony Iodice and endorsed over to Mr. Robbins was obtained by Mr. Walsh from the State Liquor Authority. (Proceedings March 30, 1976 p 22)

Questions were also propounded to Mr. Walsh concerning $5,000.00 that Lillian Cohen was going to give to appellant Sacco to invest for Her

The conversations pertaining to this transaction were recorded on the tapes by the Westchester Authorities and Mr. Jacobs was attempting to prove that Mr. Walsh obtained this information from them. (Proceedings March 30, 1976 pp 32 thru 38)

The only other witness that Mr. Jacobs put on for examination was James William Robbins who was unable to contribute anything to the taint because Mr. Jacobs did not read the logs nor did he listened to the tapes in order to cross-examine him properly. (Proceedings March 30, 1976 pp 75 thru 79)

Mr. Jacobs made an application to the Court to call Mr. Kaplan of the State Liquor Authority as a witness to determine exactly what information he received from the Westchester Authorities, and what he divulged to Mr. Walsh. (Proceedings March 30, 1976 p 78)

In addition to Mr. Kaplan Mr. Jacobs also informed the Court that he issued subpoenas for Fitty Fabian, Lillian Cohen and William Fabian. He informed the Court that he was unsuccessful in locating them and requested a week's adjournment. (Proceedings March 30, 1976 pp 79-80) It should be pointed out that these witnesses never testified nor is there indication in the record that Mr. Jacobs notified the Court whether he was going to call them or terminate the hearing. (Proceedings March 30, 1976 p 80)

Affidavits of Westchester officials involved in the wiretaps were submitted by the government denying that any of the wiretap material or information had anything to do with James Robbins. (Supp. Appendix-Exhibit E).

that they were broad and did not specifically state that they did not give information from the wiretaps to anyone which they didn't know related to this case. It is submitted that the affiants of these affidavits should have been subjected to cross examination to test their reliability and credibility. For example, the affidavit of Robert L. Stanton, investigator on the staff of the Westchester District Attorney stated that he examined certain wiretap orders and telephone logs and nowhere in them did the name of James Robins appear. What he failed to state in his affidavit was that there was a conversation recorded between Sonny Robbins and Gentile.(See Supp. Appendix Exhibit) This exhibit was never introduced at the hearing held March 30, 1976, on behalf of Gentile because Mr. Jacobs, Gentile's attorney was never in possession of it.

In a memorandum decision of July 21, 1976 Judge Cagliari denied Gentile's "taint" motion upon the ground that the government had sustained its burden of showing that the information it received in connection with this case came from untainted sources. ALDERMAN V. UNITED STATES, 394 U.S. 165 (1969); NARDONE V. UNITED STATES, 308 U.S. 338, 341 (1939).

EVIDENCE OF TAINT

On September 23, 1975 appellant Sacco filed with the Court a list of witnesses that he wanted subpoened at the taint hearing (Supp. Appendix-Exhibit)*

That in October, 1974 appellant Sacco filed a reply affidavit with respect to witnesses to be produced at the taint hearing, paragraph 6 of said reply affidavit set forth the names of prosecution witnesses that were directly or indirectly associated with conversations that were intercepted by the Westchester Authorities (Supp. Appendix-Exhibit)

William McKenna, a Westchester County Assistant District Attorney, joined Carl Vergari of his office for a meeting with the strike force in April, 1970 at which Vergari disclosed evidence from the Westchester wiretap that Sacco was loan-sharking Hull. (Fla. 974-978) The strike force was given copies of the state wiretap orders for its review of their legal sufficiency. A few weeks later, the strick force declined to proceed with a federal prosecution because of possible legal defects in the wiretap orders. (Fla. 1099-1104) Mr. McKenna then made it his policy not to discuss wiretap information with the FBI for fear of tainting an investigation. (Fla.1111) McKenna admitted giving information from the wiretap to FBI agent Walsh that the date of the opening of Dudley's Tavern

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* This was not a complete list of the witnesses that appellant would have subpoened, and the only witnesses that testified was William Walsh.

in Peekskill, notice of Sacco's expected departure from New York, and that certain out of state people were going to be present at the opening of the bar. (Md. 1063-1073)

Louis E. Cherico, a former Westchester assistant district attorney testified at the Baltimore Gaint hearing that he recalled someone in his office contacting the State Liquor Authority in reference to the Rex and Grill that Appellant Sacco was associated with in Peekskill New York (Baltimore 1173)

Peter Arrone, Arthur Primarco and Robert Colandro were called by Sacco in Florida or Baltimore as indicated to impeach FBI agent Walsh's testimony that he first learned of the Brown and Hull matters after May, 1970 with testimony that Walsh interviewed each witness before that date about matters concerning these investigations. (Arrone, Md. 778-779, Fla. 2203-2204; Primarco, Md. 1401-1402; Colandro, Fla. 1644)

Eugene Curico, a former New York State Trooper, was assigned to the Westchester wiretapping of Frank Sacco from late 1969 until he was relieved of his duties in January or February of 1970. He monitored some of the conversations and prepared transcripts. (Fla. pp 703, 716-718, 744) Curico knew FBI agents James Walsh and Ed Taylor of the White Plains office and conferred with Taylor about information derived from the wiretaps until as late as February, 1970. He told Taylor about the Brown extortion in Florida and the Hull extortion in Baltimore. (Fla. pp 744-745) Curico stood convicted of federal charges of interstate travel in aid of racketeering that arose from his activities while a state trooper. (Fla. 800)

James L. Duggan, a defense witness testified that he interviewed eleven officials involved in the wiretapping of Sacco and that all denied any dissemination of wiretap information to sources outside the State Police and the Westchester District Attorney's office. (Fla. 2545-2549)

The interviewing of these witnesses was objected to by appellant Sacco upon the grounds that their statements were not under oath nor were they subjected to cross-examination.

INDEPENDENT SOURCE

William Walsh, who initiated the FBI investigation into the Robbins case, denied receiving any information from the Westchester County District Attorney's office pertaining to the Robbins investigation. (N.Y. 20) Walsh did not listen to any tapes or see any transcripts of the State Wiretaps. (Md. 849) The investigation of the Robbins loan began in the late summer or early fall of 1971 and was based on a statemsnt from a confidential informant that Robbins was being Shylocked by Sacco. (N.Y. 57-62; Fla. 370-374) Walsh went to interview Robbins in September, 1971 with no results. (Tr. 868-870) Subsequently, Robbins contacted the FBI and advised Walsh of all the details of his loan from Sacco. (Fla. 381-389, 497-500; Tr. 860) Walsh met Eugene Curico only once and never received any information about extortion cases from him. In fact, he avoided Curico after November, 1969 because he knew that Curico and Charles Cassino of the New York State Police were under investigation. (Fla. 317-319) Walsh was notified of the existence of the State wiretaps on May 27, 1970. (Md. 890) Walsh learned of the opening of Dooley's

tavern from another FBI agent who got his information from a proprietor of a liquor store located across the street from the tavern. (N.Y. 73)

Ed Taylor, testified that Eugene Curico never gave him the name of Brown or Hull. (Fla. 848) After October 1, 1969, Taylor avoided Curico and Cassino because they were under investigation.(Fla. 953-954)

DENIAL OF APPELLANT SACCO'S MOTION TO REINSTATE

On June 3, 1976, Judge Gagliardi handed down a memorandum decision denying appellant Sacco's motion to reinstate the taint hearing (Supp. Appendix-Exhibit). Relying on precedent that permits a defendant's appeal to be unconditionally dismissed by reason of his being a fugitive from justice, Molinaro v. New Jersey, 396 U.S. 365, 90 S.Ct. 498, 24 L. Ed.2d 586 (1970), United States v. Sperling, 506 F.2d 1323, 1345 (2nd. Cir., 1974), the court asserted the same power as to a fugitive defendant in a district court post conviction motion. Judge Gagliardi then refused to exercise his discretion to reinstate Sacco's motion because, inter alia:

> Although numerous post-trial proceedings have already been held in the court on these motions Sacco has yet to demonstrate that the wiretaps of the State authorities in any way tainted his conviction here.

Appellant Sacco argues to this Court that Judge Gagliardi abused his discretion in not reinstating the "taint" hearing on his behalf espically when he proceeded with the same hearing on behalf of Gentile. Based upon accepted cases in the Fifth Circuit concerning "fugitive status", it would not have been an abuse of discretion for the lower Court to reinstate the "taint" hearing. See, United States v. Doyle Ray Henderson, 74-4024 (Fifth Circuit);

United States v. Rap Brown, 456 F.2d 1112, (1972); McKinny v. United States, 403 F.2d 57; United States v. Miller, No. 74-4047; United States v. Joseph D. Gantt, No. 73-1104 (Fifth Circuit)

While most of the cases cited above dealt with appeals of convictions, the reasoning therein should be fully applicable, to post convictions motions filed and pending in the District Court.

Indeed, the Court in Molinaro, supra, said nothing, that prevents reinstatement of an appeal under the proper circumstances. The Court went further on to say that an "escape did not strip the case of its character as an adjudicable case or controversy." 396 U.S. p 366.

In the instant matter, equal protection as well as due process is involved and it is appellant Sacco's contention that the District Court should have afforded him the same procedural rights that the Fifth Circuit afforded in Brown and McKinney, supra, that is, reinstatement of his post-trial "taint" hearing upon termination of his fugitivity.

On June 9, 1976, at Sacco's sentence hearing, Judge Cagliardi "confirm(ed)" and "adopt(ed)" the conclusions of Judge Kaufman against Sacco in Baltimore. In Baltimore, Judge Kaufman stated:

> ...I have an opinion as to what the standard is with regard to burden of proof under these circumstances, but if I were proceeding on a basis where the government had the burden of proof beyond reasonable doubt, I would find and do find beyond a reasonable doubt that there is no evidence that the government utilized directly or indirectly the fruits of the wiretapping...

(Proceedings, May 28, 1976
Supp. Appendix-Exhibit Q)

While his appeal to the Second Circuit was pending Sacco on October 7, 1976 moved before Judge Pagliardi to have his appeal remanded for a "full and complete taint hearing." (Supp. Appendix-Exhibit R) In support of his motion Sacco stated:

> 20. I respectfully submit to the Court that if the hearing was afforded to me that I would have impeached the credibility of F.B.I. agent Walsh and sustained my burden that the information the government received in connection with this case came from "tainted" sources.
>
> 21. I further submit that neither my co-defendant Gentile or his appointed counsel ever listened to the tapes or reviewed the logs and were unfamiliar with the facts or witnesses that could have proven the "taint".

On November 23, 1976, Judge Pagliardi in a memorandum decision (Supp. Appendix-Exhibit S) denied the motion stating not only that he had lost jurisdiction to pass upon the application but also that he would deny the motion even if he had jurisdiction for the reasons stated in his memorandum decision of June 3, 1976.

IMPUTED KNOWLEDGE OF THE TAINTED EVIDENCE

Appellant Sacco requests of this Court to recall the conviction against him upon the ground that there was imputed knowledge of the tainted evidence introduced against him between the joint Task Force, the F.B.I., the State Liquor Authority, and the Bureau of Alcohol Tobacco & Firearms. United States v. Haddad, 496 F.2d 455 (2nd. Cir. 1974) It is undisputed that the District Attorney's office of Westchester County turned information

from the wiretaps over to the above named government branches that were working in close cooperation with each other. For example, at the Baltimore hearing, Agent Walsh of the F.B.I., testified that the Westchester Authorities called him on May 27, 1970, and told him that they had intercepted conversations between Sacco & Hull and they were going to send investigators to Baltimore. (Maryland post-trial hearings pp 838-839) Mr. Walsh also admitted that he called Mr. Gerald McGuire, Assistant Special Attorney in charge of the Task Force and inquired of him as to what their position was to investigate Federal crimes. (Balt. p 855).

William H. McKenna, an assistant District Attorney for Westchester County testified that on April 2, 1970, a meeting took place in the office of the District Attorney with Mr. Hollman, the head of the New York Joint Strike Force, his assistant, Mr. McGuire and District Attorney Carl Vergari to discuss the possibility of the Joint Strike Force assuming the investigation up to that date concerning appellant Sacco's extortionate loan transactions involving people in other States. The Strike Force was told that there were wiretaps and they were given the original wiretap order of September 1969 and the subsequent extension orders.* (Balt. pp 977-980)

Mr. McKenna also testified that he personally gave F.B.I. Agent Walsh information from the wiretap that dealt with appellant Sacco's anticipated departure from the jurisdiction and that Sacco had something to do with the opening of a bar in Peakskill New York. He also told him

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* The subsequent orders had portions of intercepted conversations in them.

that certain out-of-State people were going to be present. (Balt. pp 1069-70)

Mr. McKenna also recalled disseminating certain information to the United States Attorney's office in Orlando Florida for the purpose of assisting cross-examination developed with respect to appellant Sacco. (Balt. p 1066)

Louis M. Cherico, another assistant district attorney from Westchester County testified that he recalled his office contacting the State Liquor Authority about appellant Sacco's relationship with the bar and grill in Peekskill New York.

The record in the instant matter, excluding the full and complete Alderman hearing that was not afforded appellant Sacco supports his argument that the knowledge of the tainted evidence introduced against him at trial in the possession of the Joint Task Force, the State Liquor Authority, and the Bureau of Alcohol, Tobacco and Firearms was imputed to the F.B.I.

If this Court accepts appellants argument that the knowledge of anyone of the participants in the Joint Task Force of State and Federal prosecutorial investigative agencies would be imputed to all others who participated therein, then a prima facie case has been established by appellant.

If this argument is accepted by this Court, there is no question that the government now has a stiff burden to show that nothing, in no shape or form of the information came directly or indirectly from the Joint Task Force.

Since the government has conceded the illegality of the Westchester wiretaps, and while it is the rule under Alderman, supra, that a defendant must come forward producing evidence showing "taint" in a substantial portion of the government's case against him, 394 U.S. 183, this opportunity was not afforded to appellant Sacco nor was he afforded the opportunity to refute the independent source of proof that the government came forward with. United States v. Sapere, 531 F.2d 63 (1976).

On the strength of the record and the argument of appellant Sacco in his motion for a remand for a full and complete "taint" hearing (Supp. Appendix-Exhibit R) and this brief's "taint" facts, this Court should remand the case to the District Court for a full and complete hearing that will give appellant Sacco an opportunity to impeach the credibility of F.B.I. Agent Walsh and establish "taint" in a substantial portion of the government's case against him.

ISSUE NUMBER TWO (2)

THE DISTRICT COURT ERRED IN NOT GRANTING DEFENDANT-APPELLANT'S PRE-TRIAL MOTION FOR A TIMELY EVIDENTIARY HEARING PURSUANT TO C.F.R.P. 41 & SECTION 3504 OF TITLE 18 U.S.C., TO DETERMINE ALLEGATIONS OF ILLEGAL EVIDENCE OBTAINED BY EAVESDROPPING THUS DENYING DEFENDANT-APPELLANT DUE PROCESS SECURED BY THE FIFTH & SIXTH AMENDMENTS OF THE UNITED STATES CONSTITUTION.

The factual basis surrounding the contentions of this argument, are based upon multiple events and circumstances, which involves other judiciary proceedings, etc,. In order to state a clear given view of this argument, certain factors must be set forth in chornoligical order, to avoid misconstruding same.

Defendant appellant was arrested on March 23, 1972, in Tampa Florida and was held in custody in lieu of a $250,000 bond which was the result of the indictment being handed down against him in the instant matter.

Though the defendant appellant was not arrainged in Court, and prior to trial, amoungst other motions he filed for an evidentiary hearing on March 22, 1972. In the latter motion, defendant-appellant contended that he had reasons to believe that the government was in possession of evidence gathered together by illegal eavesdropping and electronic surveillance and would use this evidence against him in Court.

Such belief, was based upon the fact that in an unrelated trial in the United States District Court for the District of Maryland it was brought out there that illegal electronic surveillance and eavesdropping was conducted by New York State Authorities. Thus the defendant-appellant suspected if the New York state authorities had so provided the government with evidence from the electronic surveillance in his trial therein in the District of Maryland case, likewise they had done so in a present case, in which defendant-appellant filed a timely pre-trial motion to determine if such evidence existed and if the government had obtained leads directly or indirectly from such illegal electronic surveillance.

On September 13, 1972 trial commenced and defendant-appellant again raised pre-trial motion to determine whether certain gathered evidence by the government could or should be suppressed because of eavesdropping making the evidence "tainted" and the court responded by stating; [Tr. p. 25]

> "In the event that they should obtain a conviction here, the conviction would be completely invalid if there were any leads gained, if the representation of the government were erroneous...Under those circumstances I am accepting the representation of the government."
>
> DEFENDANT BACCO: "Why go through a whole trial your Honor?"
>
> THE COURT: " I am required...I am not required but I am accepting the representation of the United States Attorney, and that is the same as an affidavit, sworn testimony of Mr. Broderick that no such representation is made and he is presumed to be knowledgeable of what is in his files."

The Court's assumption that the Government's representation was impeccable and accepted without challenge by defendant-appellant, certainly cannot be considered same as an affidavit and sworn testimony; holding that no such illegal evidence as a result of wiretaps being used in its representation. For the Government was not put under oath to make such a declaratory claim and yet, the Court later conceded that there were "wiretaps" and that they were illegal. See memorandum decision, No. 72 Cr. 332, Judge Dagliardi, July 21, 1976.

Nonetheless, even if the government's Attorney himself was not aware of the evidence furnished to him by the federal agents, being illegally obtained, this would not dispel the prerequisit of a pre-trial evidentiary hearing pursuant to Title 18 U.S.C. § 3504 and Rule 41(e). Thus what the Court did was allowed the Government to escape their burden under these provisions, which deals with procedural proceedings to be followed when it is alledged, as here, that evidence and leads of the Government's prosecution were products of exploitation of primary illegality.

Thus if the Court had conducted a pre-trial evidentiary hearing prior to trial, defendant-appellant would have demonstrated by preponderance that the federal agents had in fact gathered leads and evidence from the New York State Authorities, wherein illegal eavesdropping was employed, in which such evidence could have been suppressed in order to provide defendant-appellant with a "Guaranteed Fair and Impartial Trial" secured by the Sixth Amendment. Now that it is clear, "tainted evidence" was used in the trial. Through this contention can only be explicit substantiated by a full panoply evidentiary hearing, the government of this argument is predicated upon the denial to conduct timely pre-trial motion pursuant to 18 U.S.C. § 3504 and Rule 41(e).

This typical situtation presented here, is one in which the Supreme Court had not only elaborated, but took painstaking in providing the lower courts with conceptual guidance in the Alderman v. United States, 394 U.S. 165 (1969), decision. The language there in Alderman appears to support defendant-appellant contentions, that is the Court should have ordered for the "wiretaps" to be turned over tp him for examination before commencing trial, as the Supreme Court held:

> ..." Although this may appear a modest proposal especially since the standard for disclosure would be "arguable" relevance, we conclude that surveillance records as to which any petitioner has standing to object should be turned over to him... admittedly, there may be much learned from an electronic surveillance...but winnowing this material from those items which might have made a substantial contribution to the case against a defendant-appellant is a task which should not be entrusted wholly to the court in the first instance...an apparentley innocent phrase, a chance remark, a reference to what appears to be a neutral person

> or event, the idenity of a caller or the individual on the other end of a telephone, or even the manner of speaking or using words may have special signifiance to one who knows the intimate facts of accused's life...but at the same time defendant appellant's acknowledge that they must go forward with specific evidence demonstrating taint...the trial judge must give opportunity, however closely confined, to the accused to prove that a substantial portion of the case against him was a fruit of the poisonous tree," Id., at 182-183.

The Supreme Court's language above, indicates a two-fold interpretation: 1) the wiretaps should have been turned over to those defendants appellants prior to trial but since the wiretaps were discovered after they were convicted it then became rule to turn over the tapes. 2) for the trial judge to give opportunity to the accused to prove that substantial portion of the case was fruit of the poisonous tree. In the latter rule, requiring the trial judge to give opportunity to the accused to prove his case, such a rule was not confined to subsequently of a conviction. Rather, instead, the rules carries the language that once, as here, a defendant-appellant has standing to object with regards to wiretaps etc., (in this case at bar defendant-appellant vigorously argued for an opportunity to prove his case involving taint). The tapes in question had to be turned over to him and the trial judge must and should have conducted an evidentiary hearing in order to give defendant-appellant his opportunity to prove his case involved taint. Specific evidence demonstrates taint in a substantial portion of the government's case., against him which was not afforded to him. United States v. Saferi, 531 F.2d 63 (1976).

While it is the governments ultimate burden of persuasion to show that its evidence of appellant Sacco was not tainted directly or through a connection to the illegally procured wiretap information, Alderman supra further established, however, that appellant has the initial burden of producing.

The significant question remains here as to why, the trial judge in this case, would not conduct an evidentiary hearing per se to defendant-appellant's timely pre-trial motions, pursuant to 18 U.S.C. § 3504 and Rule 41(e) and; reasons proffered claiming standing to object to the Government's prosecution in which defendant-appellant believed to contain tainted evidence involving illegal wiretapping.

The Supreme Court in Nardone v. United States, 308 U.S. 338, 341-42 (1939), speaking through Mr. Justice Frankfuter, held explicity that hearings to determine whether the government's evidence is "tainted" by unlawful wiretapping should be held in advance of trial:

> "...claims that taint attaches to any portion of the government's case must satisfy the trial court with solidity and not be merely a means of eliciting what is in the government's possession before its submission to the jury. And if such claim is made after the trial is under way, the judge must likewise be satisified that the accused could not at an earlier stage have adequate knowledge to make his claim."
> (emphasis added)

Thus the court in denying defendant-appellant trial motions for an evidentiary hearing and suppression hearing which were renewed again on the date of trial, had not only effectively prevented Title 18

18 U.S.C. § 3504 and Rule 41(e) Cr. P. operating as intended by Congress denied defendant-appellant's "Due Process" secured by the Fifth Amendment through the Fourteenth Amendment of the United States Constitution. cf. Nardone v. United States, supra; Jones v. United States, 362 U.S. 257, 264, 80 S.Ct. 725, L.Ed.2d 697 (1960).

The proper sequence is to comply with Rule 41 (e) by a hearing before trial as the rule provides. This protects the trial from error and enables the defense at the most appropriate time to obtain a ruling on the usability by the prosecution of important evidence. Such failure to conduct pre-trial evidentiary hearing has warranted relief for the aggrieved defendant. Battle v. United States, 120 U.S. App. D.C. 345, F.2d 438 - 440 (1965).

In Henderson v. United States, 349 F.2d 712 (U.S. App. D.C. 1969), the court there held in a narcotic conviction, on appeal from post-conviction proceeding, that remand was an appropriate remedy for the District Court to conduct an evidentiary hearing on the issue of probable cause wherein the District Court failed to conduct pre-trial hearing pursuant to Title 18 U.S.C. Rule 41 (e). However, it is significant to point out that, Chief Judge Bazelon, had dissented in the Henderson's decision for the sole reason, in that he felt since the District Court failed to comply with Rule 41 (e), the case should be reversed rather than remanded, (Id., at 713). He further stressed emphasis as follows:

> " The failure to afford a pre-trial hearing is the more important, I think, because it was clear that acquittal would realistically be expected only if the narcotic capsules seized after a warrantless arrest, were suppressed. Id., at 721.

The case relied upon by appellee and pursuant to the instant case at bar, can be deemed in concluding that this case should be reversed rather than remanded wherein the District Court failed to conduct an evidentiary hearing pursuant to Rule 41 (e) and § 3504 bases upon the defendant-appellant's pre-trial motions. It is clear in this case, that a direct verdict of acquittal could realistically have been expected if the government was found to possess, gathered evidence which were illegally obtained by eavesdropping, were exposed and suppressed.

Moreover, this Court has addressed a similar situtation, as here, in United States v. Birrell, 470 F.2d 113 (2nd. Cir. 19__). In the Birrell's Decision, the specific question of when a motion to suppress must be decided was raised because the trial judge had ruled that, no hearing on the motion was necessary since he could reconsider the matter and grant a hearing if this deemed desirable in the event of a conviction. This Court held:

> "...When a motion to suppress has been made prior to trial, we do not approve such an extension of the practice of postponing a "taint" hearing untill after the verdict, which was devised by the late judge Herlands to meet the exceedingly hard problem confronting him in another prosecution of the appellant.." Id., at 115.

The Due Process principals of fundamental fairness and of a "timely revocation hearing" has been recognized to require acceptness among courts: Hahn v. Reris, 520 F.2d 632 (7th cir. 1975); Cleveland v. Ciccone, 517 F.2d 1082 (8th cir. 1975).

Consideration of procedural due process claims is a two-step inquiry: first, does the deprivation under challenge constitute a denial of liberty or property within the meaning of the due process clause, and second, if so, upon consideration of the private and governmental interests are same at stake or implicated, is the deprivation thus unconstitutional? E.G., Board of Regents v. Roth, 408 U.S. 564, 570-71 (1972); Morrissey v. Brewer, 408 U.S. 471, 481 (1972). As to the first half of this analysis, the Court in Morrissey found that a parolee's interest in not being incarcerated solely on the basis of an executed parole violator warrant was cognizable under the due process clause. As for the second half of this analysis, insofar as concerned with defendant-appellant, he contends that he need not assert an interest in immediate liberty to claim the constitutional guarantee of due process. Wolff v. McDonnell, 418 U.S. 539 (1974).

Moreover, the underlining basis which prompt the Seventh Circuit Court of Appeals to enunicate a per se rule calling for timely revocation hearings to be held within ninety (90) days, in Hahn v. Revis, supra, can certaintly realistically be seen and conceived to be just as compelling by contrast here in this case, warranting a timely pre-trial motion to be held. In Hahn, if the timely revocation hearing was not held in ninety (90) days, because of the likely prejudices (as here), the remedy was dismissal of the detainer. Likewise, the charges here should be dismissed. Henderson v. United States, supra, Chief Judge Bazelon, dissenting opinion based on the issue of relief.

Therefore, this Court should reverse the judgment of the United

indictment be dismissed, with prejudice for all the foregoing reasons so warrants the relief in which the defendant appellant seeks.

ISSUE NUMBER THREE (3)

THE TRIAL COURT COMMITTED REVERSIBLE ERROR, WHEREIN IT FAILED TO GRANT DEFENDANT'S MOTIONS FOR MIS-TRIAL AND, TO GIVE IMMEDIATE CAUTIONARY INSTRUCTIONS UPON THE GROUNDS OF PROSECUTORIAL MISCONDUCT

Following the conclusion of all the evidence being submitted to the jury, both the prosecution and defense presented closing arguments, in which the Government's prosecutor had allowed himself to commit multiple prejudicial misconduct effects.

Moreover, the government's prosecutor had made himself a unsworn witness testifying to matters that were not in evidence, stating alleged facts of his knowledge, misrepresenting the facts and evidence which were in evidence, and asserting his personal belief as well as attesting to government's witnesses credibility.

However, since there are several aspects of the lengthy trial record demonstrating and substantiating the government prosecutor's misconduct effect, defendant-appellant will attempt to show cause, in chronological order.

1. At the very begining of the government prosecutor's summation, Mr. Patrick Broderick, the prosecutor, told the jury the follow-

"He started telling us certain things. He started telling the agents of the F.B.I. He mentioned the first thing about how he obtained the loan, government's exhibit # 1 in evidence. He obtained $500.00. He was not afraid. It was only a two week loan, he got some rent, pay it, $25 a week, no problem. He was not worried about that. He weren't questioning that. We never said anything about that." (Tr. p. 1404-5 Emphasis supplied)

The statement made to the jury that the government wasn't questioning that particular loan above was incorrect and untrue in that the first Count of the indictment charged as follows:

THE GRAND JURY CHARGES:

On or about March 16, 1970, in the Southern District of New York, the defendant, Frank Sacco, as creditor, unlawfully, wilfully and knowingly did make a loan in the amount of $500.00 to James Robbins, the debtor, with respect to which loan it was the understanding of the defendant creditor and the debtor, at the time the loan was made, that delay in making repayment and failure to make repayment could result in the use of violence and other criminal means to cause harm to the person, reputation and property of the debtor and others. (Title 18 U.S.C., §'s 891 and 892)

It is quite obvious from Count # 1 of the indictment that, the Grand Jury found sufficient evidence presented to them by the government, to indict defendant for making the loan of $500.00 to James Robbins.

Furthermore, following the prosecutor's misleading presentation concerning the forementioned loan, the Court failed to give an immediate

cautionary instruction. Yet, it is obvious that the government were questioning the forementioned loan and, it was to their dismay that the alleged victims had testified truthfully of the loan as to the reason Count #1 of the indictment was dismissed.

What the prosecutor failed to inform the jury, was that Count #1 of the indictment was dismissed because of the lack of evidence in that Mr. Robbins, the victim, testified that he was never put in fear nor did he have the understanding that failure to repay the loan could result in the use of violence.

The prosecutor's remarks that Mr. Robbins was not afraid, that he wasn't questioning that and, that he never said anything about that was objected to by counsel and overruled by the Court as follows:

> MR. JACOBS: Your Honor, I object to this your Honor. There is Count #1 in this indictment, your Honor. How can he say that?
>
> THE COURT: It is very well. Mr. Sacco referred to the $500. loan in his summation. The jury knows that this count #1 is no longer in this case. It has been dismissed.
>
> MR. JACOBS: He is saying there is nothing wrong with it, he says the government was never told there was anything wrong with it.
>
> THE COURT: Proceed.

2. In reference to Mr. Ruggerio, a witness who testified at trial, the prosecutor told the jury:

> "Mr Ruggiero then comes in and testifies, 'Yeah, I did mention to him something about that". And what did Mr. Gentile say back? Dont worry about the thing, take the money off him and we will take care of him. (Tr. p. 1407 Emphasis supplied)

There was an immediate objection made by defendant and the Court ruled that it was the jury's recollection of what the testimony was. The Prosecutor knew very well that such testimonial statement "we will take care of him" was not entered as evidence when stated. Though, subsequently he attempted to ameliorate the inflammatory remark by rectifying same, in referring to the correct testimony as follows:

> MR. BRODERICK: We will take care of the money, dont worry about that. (Tr. p. 1407)

3. In continuations of insinuations, misrepresentations, and other flagrant remarks as to offend the concepts of a fair trial and due process, the prosecutor never ceasing in same, told the jury that the wife of the victim in question was threatened concerning a loan transaction between the defendant and her husband:

> "She was involved. She knew about the money being loaned out, the $25 a week. She saw Gentile coming up. But now the defendant Gentile, he doesn't call up Sonny Robbins. He does not call Sonny Robbins up. Who does he call up? He calls up the name wife and mentions the word, You know, he has an obligation to us. Of course, he did it in a nice manner, very nice. He has an obligation to us. He has an obligation. You know, he should pay it, dont you Mr. Robbins? How is your business? How is everything coming along? (Tr. p. 1408)

> MR. JACOBS: Is he testifying now, your Honor. I dont recall any of this.
>
> MR. LANZA: He is making himself an unsworn witness.
>
> MR. JACOBS: None of this is testimony. This is all new.
>
> THE COURT: He can make any reasonable mention of any testimony that is in evidence.

MR. LAWRA: He cannot make himself an unsworn witness. (Tr. p. 1408)

Another statement made by the prosecutor that was not reasonably supported by the evidence is when he told the jury:

> "The defendant Sacco didn't forget. Did he forget with Kitty Fabian when he spoke to her two months ago, You owe me $4,000." (Tr. p. 1410 Emphasis supplied)

Indeed the testimony of Mrs. Fabian with respect to the above statement made by the prosecutor shows the following:

> Q. Do you remember having a conversation with the defendant Sacco - - when was the last time you had a conversation with the defendant Sacco, the date?
>
> A. I dont remember the date, but it must have been about two months ago when I went to visit him - -
>
> Q. All right. When you had this conversation with him, what did you talk about?
>
> A. He thought perhaps I could pay him back some of the money that I owed him, he needed money for lawyers.
>
> Q. Did he mention how much you owed him?
>
> A. No, he didnt say anything. I told him I couldn't pay him back and he didn't seem to think anything of it then. (Tr. p. 379)

Thus with respect to the erroneous statement made by the prosecutor to the jury, in that Kitty Fabian had testified that defendant told her, "you owe me $4,000", the record clearly shows this to the contrary.

At the same time that the prosecutor made the erroneous statement to the jury about Kitty Fabian, he also told them: (Tr. p. 1410)

"Did he speak to any of his other witnesses there? Anyone who enters into business with him, business in quotes, seemingly goes out of business, except the defendant Rhines. He does not go out of business, because he takes over the business of Mr. Palumbo after he meets the defendant Sacco." A little bit different here.

MR. LANZA: I am going to object to that. I think there he has become an unsworn witness and I am going to ask for a mis-trial at this point. (Tr. p. 1410)

Compounding this error with others, the prosecutor went further on to tell the jury:

> Then it comes to 12/10. Mr. Rhines testified, I received some phone calls from Mr. Sacco. Oh, I dont mind doing it, I dont mind going up there for Frank. "I'll go pick up some money for him, What the heck, you loaned Palumbo money once and now I have the business." (Tr. p. 1417) Emphasis included

Again, there was an immediate objection made by defendant and, counsel for defendant Centa... who told the Court that, there was no such testimony and moved for a mistrial which was denied. (Tr. p. 1418)

For the convenience of this Court's time and sake of this appeal, defendant will delineate the errors complained of in chronological order, without interruptions as follows:

> "Then what happens? Mr. Sacco he gets up and goes for a walk with Sonny Robbins. Sonny Robbins is thinking about bulletholes right now in a car. (Tr. p. 1412)

MR SACCO: Your Honor, there was no such testimony as to what he (Sonny Robbins) was thinking at that time.

THE COURT: No, overruled.

Continuing his summation, Mr. Broderick further tells the jury:

> They go for a walk, go down. Excuse me. By the way, about this testimony and operation of the mind, that is incredible testimony. (Tr. p. 1413)

> 6. Mr. Lane mentioned in his summation that's not the way stylistics operate. I don't know how they operate, but I know there were phone calls all the time (Tr. pp 1414)

MR. LANE: Your Honor, again he is making himself an unsworn witness.

THE COURT: I don't think so. I will overrule that Mr. Lane.

MR. LANE: I ask for a mistrial. I think your Honor should rule on my mistrial motions.

THE COURT: I deny your motion for a mistrial.

MR. LANE: Exception. (Tr. 1414)

> 7. If I am talking about you, about money you owe me, and I tell another guy he is no good and threaten some other guy - -

MR. GAGGO: That's not true your Honor, at this time I move for a mistrial.

THE COURT: The motion is denied. (Tr. p. 1415)

(Defendant interrupts here); Defendant directs the Courts attention to the record, in order to show that, no threatening or remarks, "no good" were testified to by the witness, as follows:

> (Robbins testifying) "He had asked him if he had known how was so and so. And the fellow says, "Hell, I knew him." And the fellow says, "he's alright". Drunk; (defendant) says: I don't know, should I say it? Frank, he says, "Tell him Frank says he sucks" (Tr. p. 187)

8. He's got to tell the truth, because if he is not telling the truth they will know, "I'm lying", so he told the truth all the time, always told the truth. (Tr. p. 1419)

9. We dont want any witnesses. We are going to pay off a loan. Unfortunately, agents were there and they took the pictures of him going in the back of the shopping center, around the corner, by a laundromat where no one could see him get the envelope for Frank Sacco. (Tr. p. 1419-20)

MR SACCO: Your Honor, there is no pictures to indicate that they were behind a laundromat. The pictures speak for themselves. It is an inaccurate statement. I move for a mistrial. (Tr. p. 1419 - 20)

(Defendant interrupts here again) Defendant contends that the pictures and contention which were referred to by the prosecutor, as implying that, "they went behind a laundromat and that an envelope had exchanged hands, is misrepresented. For clarification it was defendant and the witness who were depicted in the pictures but, there is no testimony or evidence of them going behind a laundromat nor a envelope being passed between them.

Indeed, the witness testified that:

> "Then we went on in the conversation and Frank had said "let's go next door", which is a laundromat. We went outside, we were going to go into the laundromat and it was crowded, so he says, "well, we will walk". So we walked on to a market, which was the A&P. (There is no testimony or evidence whatsoever of an envelope being passed. (Tr. p. 186-8)

10. You remember here they all know that Robbins is thinking of bulletholes and that Sacco is a violent person.

MR. SACCO: Objection, your Honor. At this time I move for a mistrial.

THE COURT: The motion is denied. (Tr. p. 1424)

(Defendant interrupts here): Defendant has already earlier in this brief, expressed his views concerning as to what Robbins was thinking, with regards to bulletholes but it is important to now show the scrupled statement that, "Sacco is a violent person," is not properly stated in its context:

Q. Do you know at the time that you borrowed this $1,000, what the reputation of the defendant, Frank Sacco, was in the community there, at the time that you borrowed this $1,000?

A. Well, I had heard that he wasn't the best of person to be doing business with. (Tr. p. 218)

THE COURT: Understanding of the reputation of Mr. Sacco in the community at that time, yes.

A. At that time, that he was dangerous. (Tr. p. 222)

A. I was under the impression that something would happen. I just didn't know what. I was in fear that I may get beat up or something like that. That's about all. (Tr. p.222)

11. He had to be telling the truth. (Tr. p. 1425)

12. They already had James Sonny Robbins testimony. They had the testimony of five Agents, They had the testimony of Amedits, who Mr. Ienna says was telling the truth. Then I submit to you he was telling the truth when he overheard the conversation between the defendant Sacco and the defendant Rhines and he said, "let's see how much money he has."

[illegible] That's right. (Tr. p. 1428)

13. Ladies and gentlemen, Sonny Robbins testified here, testified truthfully, the best way he can. (Tr. p. 1430)

Immediately following the prosecutors summation and the exclusion of the jury, the defendant Sacco, made the following motion:

MR. SACCO: Your Honor, at this time I would move for a mistrial based upon the improper prejudicial remarks that the prosecutor made in his summation that were not warranted by the testimony of the defendant's herein.

THE COURT: Can you be more specific?

MR. SACCO: I mean of the witness therein.

THE COURT: Will you be specific?

MR. SACCO: Your Honor, I would have to go through the testimony and pick it out little by little. (Tr. p. 1434)

After having given the defendant the opportunity to read the transcript of the summation and the Court doing the same, the Court stated:

THE COURT: All right, that takes care of that. In connection with yesterday's summations, I just a few minutes ago received a copy of Mr. Brodericks summation or part of Mr. Brodericks summation. On page 14 there seems to be something. Does anybody have any comments in respect to that?

MR. SACCO: Your Honor, I just checked the testimony

and it doesn't reflect what Mr. Frederick said to the jury. The testimony is entirely different. Mr. Trivarco testified that it was J.D.'s and became Robbins at a later date.

THE COURT: No, sir. I am referring to the question of the loan to Palumbo and so forth.

MR. SACCO: Yes, your Honor, It says, "what the heck, you loaned palumbo money once and now I have the business."

MR. BRODERICK: I apologize, your Honor. That I have marked down as the 12th objection to my summation and for some reason I dont know how I said that. I dont know if - - -

THE COURT: I think we will agree - - that Mr. Rhinas did not testify to that.

MR. BRODERICK: That is correct, he did not, your Honor. (Tr. p. 1445-46)

It is significant to point out here that the Court did not give any immediate cautionary instructions following any of these prosecutorial misconduct effects, as described hereinabove except for one wherein the prosecutor agreed with the Court that the statement made by him concerning the loaning of money to Palumbo and the taking over of his business was not correct. (Tr. p. 1445-6)

THE COURT: I will correct that. That is the only correction I am going to make.

MR. LANNA: The others you are not going to take any issue with?

THE COURT: No, two others, I believe, are the jury's recollection as to the testimony and this one I think is, under these circumstances - -

MR. SACCO: I will enter my same objection as I noted yesterday and also as to the harassment, your Honor. (Tr. p. 1447)

The Court then went on to charge the jury that the statement made by the prosecutor, "What the heck, you leaned Palumbo once and now I have the business" was not contained in the record of this case. (Tr. p. 1450)

A judge's corrective statement will rarely cure the prejudicial damages created when improper information reaches the area of the jury. Prejudices which are so easily aroused are not thus so readily expunged. More strongly put, Mr. Justice Jackson said:

> "The naive assumption that prejudicial effects can be overcome by instructions to the jury - - all practicing lawyers know to be unmitigated fiction." Krulewitch v. United States, 336 U.S. 440 453, 69 S.Ct. 716, 93 L.Ed. 790

In the present case at bar, the issues presented with respect to the prosecutors errors cannot be deemed as harmless error when the substantial rights of the accused are violated and in order this sort or error be considered harmless, the government must prove beyond a reasonable doubt that the errors complained of did not contribute to the verdict obtained. See, Chapman v. California, 386 U.S. 18, 24, 87 S.Ct 824, 828.

The initial effect of the remarks cast by the prosecutor to

witness were not in evidence and were fraught with prejudice. With respect to the statements made, "What the heck, you loaned Palumbo once and now I have the business," infered upon the jury that defendant was extorting Palumbo and when he couldn't pay, took his business away from him, when in truth there was no such testimony as conceded by the prosecutor, and the corrective statement given by the Court.

The defendant, of course must show prejudice to his cause in any case, and appellate Courts in most cases presume that prompt remedial action by the trial judges, negates the impropriety etc. United States v. Leasure, 511 F.2d 1, 6 (7th cir. 1975)

The prosecutor in this case, created multiple and conglomerated errors of prosecutorial misconduct effects, to not only prejudiced the defendants trial but too, he broke every rule in the jurisprudence as to deprive the defendant of a fair and impartial trial secured by the Sixth Amendment of the Constitution.

Several appellate Courts have held that the prosecutor may not make statements that are not reasonably supported by the evidence. United States v. Latimer, 511 F.2d 498, 502-3 (10th cir. 1975), and they may not comment on the credibility of witnesses, United States v. Aloi, 511 F.2d 585, (2nd Cir, 1975), or may not appeal to the jury's prejudices by inflamatory remarks. Kelly v. Stone, 514 F.2d 18, 19 (9th cir. 1975) per curiam, cumulative effect of improper comments and remarks.

Furthermore, the prosecution's vouching for police, (as here it was the witness which also included F.B.I. Agents) has been held as

clear error and prejudicial, warranting a new trial. United States v. Ludwig, 508 F.2d 180, 143 (10th cir. 1974). Determination of credibility, of any witness, is a jury's function and prerogative and not the Courts or prosecutors. Anarcia v. United States, 269 U.S. 466,; United States v. Williams, 447 F.2d 894 (cir. 1971). Nor, is it permissible to bolstering the prosecution's witnesses credibility, (as here) or to strategically phrase and construct its arguments to prejudice the accused's trial-jury against him. United States v. Puco, 436 F.2d 761-2, (cir. 1971.)

It is evident from this case at bar that the prosecutor engaged in zealousness to the extent of over-kill, which has been condemned by many Courts. The unsworn statements by the attorney for the government intentionally referring to matters which were not in evidence and points of alleged facts not mentioned in his opening statement, violated the defendants constitutional rights to cross-examine witnesses against him and denied him the right to produce witnesses to defend against the matters outside the record that were critical to his defense which were highly prejudicial.

It was clearly improper for government counsel to state facts of his own knowledge, not in evidence or to make unwarranted inferences or insinuations calculated to prejudice an accused individual.

The Rule was set forth clearly in Taliferro v. United States, 47 F.2d 698-702 (9th. cir. 1931), wherein the Court stated:

> "Cases are to be decided by jury's upon the evidence and when the evidence is offered by witnesses, the witnesses are subject to cross-

> examination. A defendant should not be subjected to a trial on the unsworn statements of an attorney conducting the prosecution, even when such statements are relevant to the case, for he would by this procedure be debarred the right to cross-examination and be also deprived of the right of offering evidence in rebuttal.

As a representative of the Government, the prosecutor, (Mr. Broderick) had a duty to seek justice rather than a conviction and he may as he did here strike hard blows but he is prohibited to strike foul ones. Berger v. United States, 295 U.S. 78, 88 (2nd. cir. 1935)

Thus reconizing this duty of the prosecution, an appellate Court should reverse a conviction "tainted" (as here) by improper prosecutotial misconduct or by statements that prejudiced the defendants rights. United States v. Ludwig, supra, United States v. Peak, 498 F.2d 1337 (6th cir. 1974); United States v. Serrano, 496 F.2d 82 (5th cir. 1974);

It should be brought to this Court's attention that the record will disclose that there were ten mis-trial motions made during the prosecutors summation all of which were denied by the Court and only one of which the Court charged the jury that a statement made by the prosecutor was incorrect.

Under the circumstances in this case the conduct of the prosecutor constituted constitutional error, highly prejudicial in nature, and of such import that it could not have been cured by an admonition by the Court to the jury and the conviction obtained against defendant must be reversed and a new trial ordered. Justice would require no less.

ISSUE NUMBER FOUR (4)

THE TRIAL COURT ERRED WHEN IT INFORMED AND MIS-TATED THE LEGAL PRINCIPLES APPLICABLE TO 3500 & JENCKS MATERIAL TO THE JURY

During the cross-examination of William Robbins, the government's main witness, the attorney for defendant Gentile asked the Court: Tr. p. 261

MR. JACOBS: Does your Honor wish me to mark the 3500 material as defendants exhibits? I dont believe they have been marked.

In a surprising statement, the Court told the jury: Tr. p. 261

THE COURT: Let me tell the jury at this time in accordance with law, prior to this witness taking the stand, the government furnished to defence counsel, all copies of statements made by this witness in accordance with law. The government has furnished that to defense counsel. Isn't that so, gentlemen? Tr.pp 261-262

Upon this erroneous remark, Mr. Lanna, counsel for co-defendant Gentile asked the Court for permission to approach the side bar in order that he make the proper objection. (Tr. p. 262) The Court did not want to hear the objection at that time and said it would hear it later.

When the opportunity was given to argue the reserved objection, Mr. Lanna moved for a mis-trial based upon the remark made by the Court that all of the material involved with this witness had been turned over to the defense. (Tr. p. 292-3)

Realizing the error, (Tr. p 295) the Court sought to correct

this erroneous impression conveyed to the jury, but the indelible impression that there was other material consistent with the witnesses testimony which defense was not using could not be eradicated.

While no per se rule exists, it is clear that the better practice is to hear Jencks motions and make any appropriate disclosures outside the presence of the jury. See, United States v. Frazier, 479 F.2d 983 (2nd. cir. 1973); Beaudine v. United States, 414 F.2d 397 (5th. Cir. 1969); United States v. Nellson, 392 F.2d 849 (7th Cir. 1968); Gregory v. United States, 369 F.2d 185 (D.C. 1966).

The rationale of the rule is to prevent the jury from drawing an inference that, the statement or statements received are consistent with the testimony elicited on direct examination. Most of the case cited take a case to case approach, i.e., and prejudice depends upon the particular circumstances of each case.

The District Court Judge in facing the proposition that his instruction to the jury was erroneous relied on the holding of United States v. Garden, 382 F.2d 601 (2nd. cir. 1969), wherein he quoted to Mr. Lanna; (Tr. p. 294), "it says;"

> "If thereafter the defendant decides to make use of any of the material for cross examination of the witness, he will be permitted to do so only upon the condition that he state preliminarily to the Court and jury that he is about to question a witness on the basis of a written statement or report which the government has made available to the defendant as required by law."

While the Court stated that the suggestion was to negate any

inference that the government had been covering something up, and there is no quarell with that, that particular suggestion was limited which the Court overstepped by stating to the jury that all 3500 material had been turned over to the defense. The jury may have very well inferred that there was other material which was co\sistent with the witnesses testimony and as a result the defense did n\t use it.

If the Court had only referred to the one document that Mr. Jacobs was referring to at the time the erroneous instruction was given, unquestionably it would have conformed with the ruling the Court expounded in Garden, supra, but instead gave the jury a carte blanche ex'mination of the 3500 material.

Indeed, another procedure that was recom\nded to be fol\wed in Garden, supra, concerning 3500 material was:

> "Thereafter all steps through the delivery to the defendant of the statement or report or the portions thereof, to which the defendant is found to be entitled, and including the allowance of a reasonable time to the defendant to examine the material will take place while the jury is still present."

There was no reason that existed for the Court to permit Jencks business to be conducted in the presence of the jury or to be instructed in the manner that it did.

(a) THE COURT ERRED IN ALLOWING BAD REPUTATION EVIDENCE OF DEFENDANT TO BE INTRODUCED INTO TRIAL IN THE MANNER IT DID AND SUCH ERROR WAS NOT CURED BY SUBSEQUENT INSTRUCTIONS

(b) THE COURT ERRED IN EXCLUDING DEFENDANT SACCO'S EVIDENCE OF REPUTATION IN THE COMMUNITY

(a) The manner in which the Court permitted evidence of bad reputation to be introduced against defendant in this case contravenes every fundamental principal of justice and due process of law.

The Court allowed the government to introduce evidence to show the alleged bad reputation of the defendant in the community of the complainant-witness Robbins pursuant to the provisions of 18 U.S.C. § 892 (c), which provides as follows:

> (c) In any prosecution under this section, if evidence has been introduced tending to show the existence of any of the circumstances described in subsection (b) (1) or (b) (2), and direct evidence of the actual belief of the debtor as to the creditors collection practices is not available, then for the purpose of showing the understanding of the debtor and the creditor at the time of the extension of credit was made, the Court may in its discretion allow evidence to be introduced tending to show the reputation as to collections practices of the creditor in any community of which the debtor was a member at the time of the extension. (Emphasis added)

Without this statutory authorization, the prosecutor would not

have been permitted to introduce evidence of bad reputation in support of the government's case. However, the introduction of this type of evidence requires strict compliance with the words and meaning of the statute.

The relevant part of Section 892 (c) provides- - -"then for the purpose of showing the understanding of the debtor and creditor at the time the extension of credit was made."

In the case at bar, the government introduced evidence with respect to the loans made to Robbins in the following manner: (Tr.p. 216-7)

Q. James Sonny Robbins, what if anything was your own understanding at the time that you obtained this money from the defendant Frank Sacco as to what the result was if you failed to repay this money?

MR. SACCO: Objection, your Honor.

THE COURT: Overruled.

MR. JACOBS: There are two sums. Can we fix the time? There are two different dates.

THE COURT: All right.

Q. When you borrowed the money the first time.

MR. SOLOMON: He answered that this morning.

A. What was my- - -

Q. Do you want me to read it again?
What, if anything, was your understanding at the time you obtained this money- - -referring to the first time you borrowed the $500- -from the defendant, Frank Sacco, as to what could result if you failed to repay that money in two weeks.

A. At the time that I borrowed it, I had never gave that any thought. I had intended to repay that money in two weeks.

Q. What, if anything, was your own understanding at the time that you obtained the $1000, coupled with the original $500, at the time you obtained this money from the defendant, Frank Sacco - - - and Benjamin Gentile was there present - - - as to what could result if you failed to repay this money?

A. I had the feeling that something would happen to my wife and my family or myself.

MR. SACCO: Objection, your Honor. I move for a mistrial at this time.

THE COURT: No. overruled. Overruled.

Defendant, in his opening statement to the jury, anticipating this type of evidence being introduced into evidence told the jury: (Tr. p. 105)

> "I am quite sure that the government in its proof will try to controvert that defination by offering testimony of the government's main witness, James Robbins, that when the extension of credit was given to him, instead of asking, "what was the understanding," they are going to ask, "What if anything, was your own understanding." (Emphasis added)

18 U.S.C. § 891 (6) defines an extortionate extension of credit as follows:

> "Any extension of credit with respect to which it is the understanding of the creditor and the debtor at the time it is made - - - -" (Emphasis added)

It was part of the government's theory in this case that it had to prove that the defendant had an agreement to extend credit in such a manner as to create in the debtor the requisite state of mind that the government felt the statute above referred to and the prosecutor assumed that case law and logic permitted him to establish the debtors own state of mind by asking, "What if anything was your own understanding..."

which was permitted by the Court contrary to the language of the statute.

The purpose and predicate for the above testimony being admitted into evidence was to establish defendants reputation in the community for being a violent and dangerous person which was accomplished and approved by the Court in the following manner: (Trop. 218)

Q. Do you know, at the time that you borrowed this $1000, what the reputation of the defendant, Frank Sacco, was at the time in the community there, at the time you borrowed this $1000?

MR. SACCO: Objection your Honor.

THE COURT: Overruled.

A. Well, I had heard that he wasn't the best of a person to be doing business with.

MR. SOLOMON: I did not hear that, if your Honor please.

THE COURT: Will the reporter repeat it?
(answer read)

THE COURT: All right. You may continue your answer.

MR. SOLOMON: Thank you very much your Honor.

A. I was then under the impression that I could be in serious trouble if I didn't meet my obligations.

Q. What do you mean by serious trouble? Would physical harm come to yourself?

MR. SACCO: Objection.

A. I would say I felt that way, that if I didn't meet my obligations that this would happen. I had heard that he was - -

MR. SACCO: Would you please wait until his Honor rules on an objection?

THE COURT: You may continue your answer.

THE WITNESS: I'm sorry, I didn't hear.

MR. [illegible]: [illegible] form, if your Honor please.

THE COURT: Overruled.

THE WITNESS: Could you read that back please?

THE COURT: Read the question and the part of the answer that has been elicited so far.
(Question and answer read)

A. - - - - -a violent man.

MR. SACCO: Same objection, your Honor.

THE COURT: Overruled.

MR. SACCO: I again move for a mistrial.

THE COURT: Denied.

It is significant to note that the government was permitted to improperly introduce this evidence of reputation and it was received without no foundation laid whatsoever as required by law for the answer of the government witness, although both the question and answer were duly objected to.

It requires no citation of authority to assert that the testimony of the government's main witness with respect to bad reputation was inadmissible as hearsay unless it fell within some recognized exception to the hearsay rule. Cases too numerous to cite support this proposition. See, United States v. Toner, 173 F.2d 140, 142-3 (3rd. cir. 1949). Strong v. State, 163 P.2d 242 (Okla Ct of App 1945); Kammands v. State, 320 S.W.2d 6 (Tex.Ct. of Crim. App. 1959), the government contended and the Court accepted the rationale, that such hearsay was admissible when limited to showing the "state of mind of the victim"

The Court then instructed the jury; (Tr. p. 220)

THE COURT: Such reputation is relevant if there is installation of fear since such reputation conveys a threat by violence.

After this erroneous instruction (for the Court stated that such reputation conveys rather than might authorize an inference, i.e., made it obligatory for the jury to find a threat of violence from bad reputation), the following ensued: (Tr. p. 221)

Q. On December 6, when you had spoken to the defendant Sacco and the defendant Rhinne, what was your understanding at that time of the reputation of the defendant Sacco in the community?

A. At that time, that he was dangerous.

MR. SACCO: The same objection, your Honor.

It is submitted that the manner in which the questions of the witnesses knowledge of appellant Sacco's reputation was improper. Since the whole inquiry was calculated to ascertain the general talk of people about appellant Sacco and to show his reputation as to collection practices in the community which the debtor was a member at the time the loan was made, the form of inquiry "what was your understanding and would physical harm come to yourself" is not allowed and "have you heard"? has general approval. Michelson v. United States, 335 U.S. 469, 482 (1948) Additionally, the quesation is directed to the "character" as well as the "reputation" of the defendant. The permissible inquiry is limited to the reputation of the accused, what those in the community perceive him to be, and not his character, what he actually is...Forcia, (Wharton's Criminal Evidence § 230, 13th Ed. 1972)

The question to the witness and the response thereto were clearly improper. There was no indication that the witnesses information was the consensus of opinion of appellant Sacco's reputation in the relevant community.

At its best, the answers given by Robbins in the instant case appears to refer to a rumor rather than to appellant Sacco's reputation. It is desirable in this connection to note the difference between one's reputation and a rumor about a person. Professor Wigmore has suggested two distinctions between reputation and rumor which may account for admission of the former but not of the latter on direct examination. "On the one hand, reputation implies the definite and final formulation of opinion by the community; while rumor implies merely a report that is not yet finally credited." On the other hand, a rumor is usually thought of as signifying a particular act or occurrence, while a reputation is predicated upon a general trait of character...5 J. Wigmore, Evidence § 1611 (3rd ed. 1940). See, United States v. Edward Langston Manley, argued December 6th 1974, Decided April 3, 1975 No. 74-1097 (Fourth Circuit)

It is respectfully submitted that appellant Sacco's reputation for violence was not properly admitted into evidence based upon the community he lived in or the community of the debtor.

(b) The government in the above issue introduced evidence to show the reputation of appellant Sacco in the community of the complainant-witness Robbins, pursuant to the provisions of 18 U.S.C. 894 (c) .

Thereafter, the repeated offers of proof of reputation by the

defendant to controvert or refute the evidence of bad reputation authorized in evidence by the Court, was rejected and denied to the jury for consideration, when offered in evidence by defendant.

It is significant to note that the subject of threats to his family was always initiated or originated by Robbins, when he testified: (P. 319)

At page 948 defendant offered proofs through Peter Ambne to refute Robbins testimony about violence and reputation. At page 973 and 997 a similar offer through Anthony Trisarco was proffered and rejected by the Court. At page 1023 a similiar offer was made through witness Carlton Miller and rejected by the Court. Likewise at page 1044 and page 1051 this offer was made through the witness Sylvester and rejected by the Court. At page 1083 a similiar proffer of proof through the witness Fabian was made and refused by the Court. A similiar offer through witness Iodice was rejected at page 1268.

By what rationale the Court permitted evidence of bad character to be introduced against appellant Sacco and refuse to admit contradictory evidence to refute such evidence is not apparent or understandable, but it is submitted that this contravenes every fundamental principal of justice and due process of law.

In Wright: Federal Practice and Procedure, the rule is stated: (par. 409)

> "Defendant, on the other hand, is always permitted to produce evidence of his good character. - - - Thus such evidence is always admissable on behalf of the defendant."

"The only proof the defendant may offer in this regard is evidence related to the trait of character involved in the offense charged. It is not enough to show that he is of good character generally. The only kind of proof admissable to show this trait of character is the defendant's reputation in the community for that trait. Specific acts cannot be shown, nor can the witness give his own opinion of the defendant's character. His testimony must be limited to what others in the community think of defendant. - - For the witness to be permitted to give testimony of this kind, there must be a showing that the witness is familiar with the defendant's reputation in the community."

In Corpus Juris Secundum Vol. 32 p.34 the principle appliable is set forth:

"Evidence of the good character of a party is admissable where his character is in issue, or where it is assailed or put in issue by the opposing party."

Generally speaking, reputation evidence offered by the prosecution would be inadmissable, sans the statutory authorization in Par. 894. However, once put in issue, it is clearly error to deny the defendant the right of refutation thereof.

The following quotation from United States v. Lewis, 482 F.2d 632 (D.C. Cir. 1973), would seem to address this point:

"The accused may elect to advance one or more of his character traits as evidence of his innocence. If he does, his proof is confined to evidence of his reputation in the community for those traits. His presentation, in terms of number of such traits may be as narrow or as broad as he chooses so long as it remains germaine to issues on trial....."

The holding of Lewis, supra even goes further by stating:

"The prosecutor cannot offer bad-character evidence

unless the accused first introduces evidence of good character; even then, the prosecutor's proof is restricted to community reputation and to the trait or traits to which the accused's own character evidence related Id at 637-638
(footnotes omitted)

ISSUE NUMBER SIX (6)

IT WAS ERROR TO DELAY SACCO'S SENTENCE BEYOND THE LIMIT PERMITTED BY THE CONSTITUTION AND BY THE FEDERAL RULES OF CRIMINAL PROCEDURE

A R G U M E N T

SACCO HAD THE RIGHT TO BE SENTENCED WITHOUT UNREASONABLE DELAY

It is appellant Sacco's contention that the District Court lost power to impose sentence upon him by reason of the length of the interval between the finding of the guilty verdict and sentence. This contention is with legal merit and factual support. The Sixth Amendment's guarantee to a "speedy trial" also applies to the imposition of sentence. See, Pollard v. United States, 352 U.S. 354, 361, (1954). If this were not enough, Rule 32 (a), Federal Rules of Criminal Procedure, surely would be:

"Sentence shall be imposed without unreasonable delay"

THE DELAY IN THIS CASE WAS UNREASONABLE

Appellant Sacco suggests that a delay of two years and eight months in imposing sentence is unreasonable on its face and undue delay in itself is unreasonable. While POLLARD, supra suggest's "the passage

of time alone may not bar imposition of sentence or require a defendants discharge....", the Court went on further to state, "(T)he delay must partake of the purposeful and oppressive, or even smack of deliberate obstruction on part of the government before relief will be granted." In United States v. Lustman, 258 F.2d 475 (2nd, cir.), cert denied, 358 U.S. 880 (1958), no prejudice need be shown, at pp. 477-8. However, in determining whether the delay has been undue, it is helpful to inquire whether the defendant was been prejudiced. See, United States v. Sanches, 361 F.2d 824, 825 (2nd cir. 1966), per curiam., United States v. Palermo, 27 F.R.D. 393, 395 (S.D.N.Y. 1961).

Whether delay is unreasonable depends on four factors; "the length of delay, reason for delay, the prejudice to defendant, and waiver by the defendant are relevant factors in considering whether denial of a speedy sentence or trial assumes due process proportions. Rule 32 (F.R.C.P.) 18 U.S.C. and Constitution Amendment 6.

LENGTH OF DELAY

The reason for delay is attributable both to the government and the District Court in that the government committed impropriety prior to trial when the prosecutor represented to the Court that no wiretapping was involved with respect to Sacco while all [illegible] while the government had knowledge of illegal wiretapping of him, such knowledge having been known to them as early as June, 1970, the time period covered in the indictment.

The deliberate obstruction on the part of the government by

their impropriety in successfully opposing an ALDERMAN hearing, Alderman v. United States, 394 U.S. 165, and suppression motion prior to trial without adhearing to Section 3504, Title 18 U.S.C., on the illegal wire-tap issue was the cause for the post-trial "taint" hearing being granted in turn was the cause for the delay in sentencing. Section 3504, supra, imposed an obligation on the government to affirm or deny by affidavit whether or not any evidence to be used at trial was the product of an unlawful act or because it was obtained by the exploitation of an unlawful act.

After the post-trial "taint" hearing was granted, the government did not act diligently and in good faith to conclude the hearing but rather obstructed it by shifting their positions from having the Court rule on the legality of the wiretaps to the "taint" issue. The government also convinced the District Court to delay the post-trial "taint" hearing until defendant-appellant's post-trial "taint" hearings were concluded in the District of Maryland and the Middle District of Florida.

Further delay by the government was that it took them one year after the post-trial "taint" hearing was granted to turn the illegal tapes over to Sacco in order that he may listen to them. It then took Sacco appellant approximately 9 months to listen to them.

After listening to the tapes, defendant-appellant filed motions with the District Court to conclude the post-trial "taint" hearing and to grant him a hearing with respect to missing tapes and tapes that may have been tampered with. By stipulation with the Courts for the District

of Maryland and the Middle District of Florida, defendant-appellant agreed that the District Court for this District would conduct the tampering hearing and that he would be bound by the findings of the Court to apply to his other cases. After lengthly delays on this issue, the District Court conducted the tampering hearing but would not conclude the "taint" hearing. While the Court filed a memorandum decision with respect to the tampering issue, it was not conclusive because of certain missing tapes. The issue still remains unresolved.

On June 16, 1975, appellant Sacco departed from federal custody and was apprehended on February 29, 1976. Shortly thereafter, he filed a motion for reinstatement of his post-trial "taint" hearing and for a fast and speedy sentence. The motion for the reinstatement of the post-trial "taint" hearing was denied and he was sentenced on June 10, 1976.

THE PREJUDICE TO APPELLANT SACCO

The prejudice that Sacco suffered as the result of the lengthly delay in sentencing was the imposition of a maximum sentence of 20 years consecutive to other sentences he was serving making it a total of 64 years. Sacco contributes this excessive prejudicial sentence to several factors. Since his conviction on October 22, 1972, in the instant matter, he was indicted and convicted in the Middle District of Florida for obstruction of Justice and given a three year consecutive sentence. As previously stated, Sacco escaped from Federal custody on June 16, 1975. On May 23, 1976, on his plea of guilty to the escape charge, he was given a 3 three year concurrent sentence. With respect to this charge,

the Honorable Lee B. Gagliardi at the time of imposing sentence in the instant matter made mention of the fact that defendant-appellant "even got little Frankie into trouble", little Frankie being Frank Armento, defendant-appellant's nephew who was sentenced to a three year term for aiding defendant-appellant in his escape.

In addition to those sentences, Judge Gagliardi made mention of another 20 year consecutive sentence that had been imposed upon defendant-appellant two weeks prior by the Honorable Frank A. Kaufman in the District of [illegible]nd on a similar charge.

Aside from the sentences that defendant-appellant received since his conviction in the instant matter, the probation report contained prejudicial material in that it should have not been shown to the Court. This information was included by an updated report since defendant-appellant's conviction in the instant matter.

Since the conviction of defendant-appellant in the instant matter and the time of sentencing, he was under an emotional strain, which caused anxiety and concern with respect to a consecutive sentence he might receive which turned out to be true. Further prejudice against Sacco was a petition for a writ of mandamus directed against Judge Gagliardi to compel him to grant him the post-trial "taint" hearing.

WAIVER BY APPELLANT

The only waiver that can be considered in the instant matter is that when defendant was convicted, he filed in this Court a petition for a writ of mandamus against the Honorable Lee P. Gagliardi requesting

that sentence be stayed and a hearing be granted with respect to the illegal wiretaps. The petition became moot when Judge Gagliardi sua sponte granted defendant-appellant's request. However, when it became apparent that the Court wasn't going to give appellant his hearing untill the hearings were completed in the other District Courts, appellant Sacco moved the Court on many occasions to complete the hearing in order that he may be sentenced. As a matter of fact, the Court being concerned about the sentencing of appellant Sacco's two co-defendants, had them through their counsel sign waivers to the fast and speedy sentencing doctrine. The Court never requested of Sacco to sign such a waiver.

In Juarez-Casares v. United States, 496 F.2d 190 (1974) the Court of Appeals for the Fifth Circuit vacated the sentence and released the defendant from custody due to a delay of two years and seven months wherein the sentencing judge relied on events that occured during the delay of sentence.

In summary the government and the Court failed to exercise due diligence to bring appellant before the Court for sentencing, and the record demonstrates that he has been prejudiced by the delay. The proper remedy in this case is to vacate the sentence with prejudice United States v. Fleish, 227 F.Supp. 967 (E.D.Mich. 1964) 8A cipes Moores Federal Practice 32.02 (3)

ISSUE NUMBER SEVEN (7)

OTHER RULINGS AND ERRORS OF THE TRIAL COURT WHICH DEPRIVED APPELLANT SACCO A FAIR TRIAL AND DUE PROCESS OF LAW

(a) APPELLANT SACCO'S MOTION FOR JUDGMENT OF ACQUITTAL SHOULD HAVE BEEN GRANTED

Based upon all of the evidence, it was submitted that the government had failed to establish a case for submission to the jury, and the indictment should have been dismissed as a matter of law.

In brief, the indictment charges two extortionate extensions of credit, conspiracy to make such extensions of credit and to collect such extensions of credit, and five substantive counts of extortionate means to collect extensions of credit.

Each of the substantive counts has, for an essential element, fear by the debtor that violence would be used to effect collection.

On the trial, the Court dismissed Count one after the witness testified that the first fear felt by the debtor inconnection with the first loan of money took place after the loan was made. (p.174) (p. 217) (p. 1173).

With respect to the second loan, which is the subject of the second count of the indictment, the witness testified profusely to his feelings if he did not make payments of the money he borrowed.

His testimony as follows is signifiant:

(p.194) "He told me that as long as I made my payments on time that I won't have anything to worry about..."

(202) "..I had blew my top at this point and I said, I don't want no trouble. I don't want no trouble from this God-damn house. I don't want anything to happen to my wife, my kids and myself."

(214) "I had the feeling that something would happen to my wife, and my family or myself."..A. I was then under the impression that I could be in serious trouble if I didn't meet my obligations."

There are similar statements in the record by the witness, but the most significent omission is any testimony that this fear of the witness was caused by the defendant. In fact, the witness testified to the contrary:

(p.319-320) "Q. Mr. Robbins, is it not a fact that pursuant to your testimony yesterday, that it was always you who broached the subject as to any threats to your family or harm to your family?

A. Yes, sir. (underscoring mine)

Q. But no words of threats, in words itself were said to you?

A. No, sir, sir. (underscoring mine)

Q. In fact, is it not a fact that you gave the same exact statement regarding Rhines and Gentile that they came up as nice guys when other guys were supposed to come up, is that what you told us?

A. Yes, I did.

The conclusion is inescapable from the only government witness that the essential element of fear required to spell out the crime charged in the indictment is lacking from the lips of the prosecutors witness, and these statements are binding on the prosecution.

Another ground which requires that this motion to have been granted is the manifest omission to introduce any evidence required under Sec. 892(b)(1) to the effect that the extension of credit "would be unenforceable through civil judicial processes...."

In the case at bar, the contrary is true, and the obligation of Robbins was enforceable through civil judicial processes. The only possible defense which could be raised to civil process to collect this item would be the defense of usuary. This defense is personal, affirmative defense, which bars the remedy if raised, and which is waived unless affirmatively pleaded. Under any construction the obligation is enforceable through civil judicial processes although collection is subject to defeasance by a conditional limitation which bars the remedy. However, under any proper legal interpreation, the repayment is enforceable, for the defense is merely one which renders the suit malum prohibition rather than malum in se. The Court cannot supply the complete omission by the government of proof of this essential element of the crime charged. Is was incumbent on the government to prove the law of the state of New York by expert testimony, to be established as a fact, and subject to being controverted as to interpreation by defendant's witness. This patent omission dictates dismissal of the indictment. The omissions of nay proof

of essential elements of the crimes charged in the indictment required that the Court grant defendant's motion for acquittal.

(b). THE VERDICT WAS CONTRARY TO THE WEIGHT OF THE CREDIBLE EVIDENCE

Stripping the record of all excess verbiage and imaterial matters adduced at the trial, it is apparent that the entire prosecution revolves and depends on the testimony of one government witness, Sonny Robbins.

Although a grandiose, spectacular setting was arranged over a period of time by the F.B.I. to 'catch' the defendants 'in the act', and elaborate means, including electronic transmitters and receivers, wire tapping equipment on the telephones of the witness Sonny Robbins, two or more extensive 'stake-outs' by a squad of F.B.I. men, even to the point of the F.B.I. supplying the 'bait' of $200.00 to make a payment, not one iota of evidence was obtainable to show the facts necessary to establish the relevant facts charged in the indictment.

In fact, it would be reasonable to assume that there actually were recordings made, as testified to by Mrs. Robbins and Agent Reuter, on the telephones, and that there were tapes made over the transmitter as testified to by Sonny Robbins and Agent Reuter, but the tapes were produced garbled or were claimed to be blank, when in truth the tapes and recordings would have exculpated the defendants of any wrongdoings, by showing that the facts were contrary to those urged by the government. The Court's naivity in accepting the government representations and then

limiting defendants proof is discussed at length in Point IV.

However, viewing the evidence from the mouth of the witness Robbins in the light most favorable to the government, it is submitted that the only fear generated in this case came from the witness to avoid his obligations to the defendant, rather than from the acts or conduct of the defendants inducing such fear

Although the Court refused to charge that the witness Robbins was an 'interested' witness, who would benefit by the outcome of this case, the following testimony showing motive is most significent:

(p.240) Q. Mr. Robbins, do you owe me any monies as of today?

A. No."

It should be apparent that the witness sought to avoid his debt due to the defendant Sacco by aiding in the prosecution of this matter. However, as a matter of law, the obligation exists, although it is sunject to defeasance by interposition of the defense of usuary.

In every instance testified to by this witness, there is no showing of and implicit or explicit threats by any defendants. The fears testified to were either instigated by this witness as a vechicle to avoid his obligations or were motivated by his own subjective mental processes of his wrongdoing. However the record is barren of any acts of the defendants upon which to predicate the elements of the crime charged in this indictment.

(c) THE COURT IMPROPERLY INFLUENCED THE DEFENDANT SACCO NOT TO TAKE THE STAND AND TESTIFY IN HIS OWN BEHALF

At page 30 the following appears in the transcript:

"THE COURT:...Motion for an order restraining and enjoining the United States Attorney from cross-examining or interrogating the defendant concerning his prior criminal record. That motion is denied.

The colquy discloses that this was a most material consideration in the defendant's decision whether to take the stand and testify in his own behalf. The error the Court indulged in is apparent from the decision of the prosecutor, late in the trial, refusing to follow the Court's decision (p.1080) but at that juncture, the prosecutor hedged and refused to state whether he would take advantage of the Court's error.

In United States v. King, 461 F.2d 53, the remarks of the Court dealing with such tactics are appropriate:

> "We think it was inexcusable that this information was witheld from the defense until the penultimate hour.---The trial of a civil case is no longer a game of surprises.---There is even greater reason for fair disclosure in a criminal case."

The Court erroneously applied the sugrested rule of law governing this situation, rather than the rulings of the Second Circuit. The prosecutor saw the error and compounded the prejudice to defendant, Who has been wrongfully deprived of a fundamental Constitutional right to testify in his own behalf.

(d) THE COURT IMPROPERLY DENIED DEFENDANT THE RIGHT TO READ HIS GRAND JURY TESTIMONY

The court permitted the government to read selected portions

of the Grand Jury testimony of the defendant Sacco. (p.795) The Court then instructed both the jury and the defendant Sacco that defendant Sacco that defendant Sacco could read the balance of the Grand Jury testimony as follows:

> "BY THE COURT:-- And if you want to read back any parts that he has omitted, you are welcom to do it.
>
> MR. SACCO: All right, your Honor.
>
> THE COURT: I might explain to the members of the jury that Mr. Broderick has the right to read as much or as little of this statement as he elects to do, and if he has omitted any part that the defendants want to read, they are welcome to do it after he has read it.---"

When defendant Sacco sought to read the omitted portions of the Grand Jury testimony (p.1193) the Court denied this right saying:

> "THE COURT: Only if it implements or contridicts testimony read."

Again, at page 1209 the Court reiterated its position, leaving the jury to infer that the defendant Sacco refused to read all of the testimony omitted because it was adverse to his contentions. This is clearly prejudicial.

(e) THE COURT MIS-STATED THE LEGAL PRINCIPLES APPLICABLE TO 3500 & JENCKS MATERIAL

Section 3500 U.S.C. Title 18 requires that statements and written

matter be turned over to the defense after the witness has testified. The prosecution repeatedly violated this rule, justifying dismissal of the indictment, but the Court countenanced such violations.

The omission to turn over the tapes, recordings and signed statements are illustrative examples appearing throughout the record. At page 269 the Court made this suprising statement:

"THE COURT: Let me tell the jury at this time, in accordance with the law, prior to this witness taking the stand, the government furnished to defense counsel, all copies of statements made by this witness in accordance with law." "The government has furnished that to defense counsel."

On objection, the Court, at page 294 sought to correct this erroneous impression conveyed to the jury, but the indelible impression that there was other material consistent with the witnesses testimony which defense was not using could not be eradicated.

Although 3500 material is utilized primarily by the defense for impeachment purposes, the Court restricted its use, by refusing to allow its utilization for impeachment, wherein the Court erroneously ruled (p.283)

"THE COURT: You know the document speaks for itself.

THE COURT: If you want to offer it in evidance, you have the option. The document speaks for itself, Mr. Jacobs."

This error precipitated a motion for a mistrial, but the Court refused to acknowledge the error, or the adverse impression created in the minds of the jury. The prejudice flowing from this ruling is self-evident, and

defendants were obligated to put the statement involved into evidence, or be faced with the inference that the defense was hiding unfavorable evidence from the jury.

This situation was primarily the result of improper actions of the prosecutor who omitted to turn over signed statements as 3500 material. At page 265 an unsigned statement of the witness Robbins was used on cross examination, and the Court stated:

> "THE COURT:- - -This is not the way to show contradictory statements. This is not his signed statement."

When the witness testified that he signed the statement, and the demand was made for the signed statement, it was produced, (p.303-304) making the Court's restriction of cross-examination on the basis of the material wrongfully turned over and finally acknowledged to be improper 3500 material, misleading, confusing and prejudicial. If the prosecution had turned over the signed statements as required by law, this prejudicial incident would not have occurred.

The prosecutor also conveniently omitted to turn over the Arnow tapes as 3500 material, until his omission was brought to light by testimony and other exhibits. At page 498 the Court denied the right to call Robbins back to cross-examination to impeach this witness by the tapes later produced, although his testimony as to the conversation recorded on the tape was in issue.

When F.B.I. Agent Amaditz testified, defendant Sacco asked for the 3500 material of this witness. The Court stated, in error, the following (p. 562)

"THE COURT: In accordance with the law and the previous statements, you have given to defense counsel all written statements and reports with respect to 3500 material."

At pages 562 and 564 when defendant Sacco protested that he had not received this 3500 material the Court again indulged in colloquy as follows, until Mr. Broderick interjected that he had omitted to turn over such material:

"MR. SACCO: Your Honor, I represent to the Court this is the first time that I received these.

THE COURT: Mr. Broderick indicated to me that he furnished them to you and everybody else.

MR. SACCO: Mr. Broderick is in error.

MR. BRODERICK: Obviously I didn't.

THE COURT: Furnish them now."

At page 651, the following appears in the record:

"THE COURT: And have you furnished all of the 3500 material with respect to this witness? (referring to witness Barnett)

MR. BRODERICK: Yes your Honor, I have. I have furnished all the 3500 material I can recollect as to the whole case right now."

It was then pointed out that Mr. Broderick had neglected to turn over the photographs taken by the agents as previously ordered by the Court in Sacco's motion for discovery and inspection.

To make more glaring the 'inadvertent' omissions to turn over material,

at pages 932-934 Mr. Broderick acknowledged his omission to turn over Exhibit 350IB, an interview of Agent Walsh with the witness Robbins. The motion of Sacco for a mis-trial at this juncture was denied (937). Thereafter Sacco was denied the right to cross-examine Robbins regarding the contents of this statement, clearly a denial of a fundamental right.

(f) THE COURT PERMITTED SUGGESTIVE, IMPROPER EVIDENCE OF DEFENDANTS RIGHTS

At page 142, the following colloquy appears:

"Q. What did you observe about the car?

A. Well, I see some things in it, holes in it that just didn't look kosher to me.

Q. What did these holes look like to you?

A. Like bullet holes.

THE COURT:- - -I will ask the jury to disregard the witness's classification as to what they were and accept only the statement as to their size and so forth.

At page 151 the Court diametrically reversed itself and stated:

"THE COURT: I let him testify that they were bullet holes."

It should be noted that the Court went further than the witness, who only testified that the holes looked like bullet holes. At page 267 the Court was corrected by the witness who stated: "I didn't say they were bullet holes. I said they looked like bullet holes." However, at this point, the damage in the jurors minds was done.

At page 359 the Court permitted F.B.I. Agent Joetz to testify to a conversation overheard between defendant Gentile and an unknown Joe. The Court permitted the following testimony, although it is not an admission, is hearsay and is objectionable under Bruton:

> " I heard Joe ask Gentile: Do you have a piece of the action and I heard Gentile say: We have a piece of the place."

The transcript is replete with similar evidence, clearly objectionable, which was permitted by the Court.

At page 586, the Court permitted the following: (Agent Amaditz testifying)

> "Q. How did Mr. Robbins appear?
>
> A. He appeared--he didn't say much- - -
>
> Q. What about his physical appearance?
>
> A. I just had a side view of his face and he appeared concerned."

What relevance or materiality this type of evidence might have is not apparent, but its wrongful effect on the jury, coupled with the plethora of testimony permitted by the Court about the F.B.I. activities to trap the defendants, created the aura in the minds of the jury which effectively eradicated the presumption of innocence the defendant may have enjoyed as a constitutional right.

(g) THE INDICTMENT SHOULD HAVE BEEN DISMISSED UPON THE GROUND THAT FALSE AND IMPROPER EVIDENCE INTRODUCED CALCULATED TO MISLEAD THE GRAND JURY INTO RETURNING THE INDICTMENT

Upon trial, appellant Sacco was furnished 3500 material and Jencks

material for the first time from which it is apparent that the indictment should have been dismissed for improper conduct and the introduction of false and improper evidence calculated to mis-lead the Grand Jury into returning the indictment at bar.

The main thrust of the government's case was predicated upon loans made to Sonny Robbins, and Sonny Robbins appeared before the Grand Jury as a witness. Predicated upon his testimony, as well as other testimony and evidence which has not been revealed to appellant Sacco, the indictment was returned.

As part of the investigative processes which led to the institution of the criminal proceeding, the said Sonny Robbins made certain statements to the F.B.I. Agent in charge of this investigation, and these statements were reduced to writing from time to time, as they were made. Prior to the time the said Sonny Robbins took the stand as a witness to testify, Sacco had no knowledge whatever of the contents of the statements made, not of the testimony before the Grand Jury. Most significant, Sacco had no knowledge of the manner of the prosecutor or his conduct before the Grand Jury which returned this indictment.

At page 14 of the transcript, the following colloquy appears:

(Proceedings of March 16, 1972)

BY THE UNITED STATES ATTORNEY:

> "Q. I have another statement dated 2/11/72, made to Agent Walsh. In that statement he says that on that date you advised that on Thursday, February 10, 1972, at about 5:30 p.m., he received a telephone call on his telephone PE 7-0515 from Benny Gentile.

Robbins stated that he knew Gentile's voice and told Gentile that he had no money to give him.

Gentile replied that they were not interested in the money at this time but wanted Robbins to sign a paper showing that he, Robbins, was liquidating his business and was indebter to Frank Sacco.

According to Gentile he wanted this signed that night in Yonkers, New York.

Robbins advised that he refused to go to Yonkers, New York on Thursday night and Gentile asked him asked to meet him in Elmsford, New York, on the following morning, Friday, February 11, 1972.

Robbins replied that he did not believe he could arrange to meet Gentile on Friday and suggested that Gentile telephone him on Friday at 9:00 a.m." (underscoring mine)

In propounding this question to the witness before the Grand Jury, it appears that the United States Attorney was reading from the written statement of 2/11/72, and this was the impression and understanding of both the Grand Jury and of the witness who was being interrogated.

When the statement of 2/11/72 was produced, it appears therefrom that the United States Attorney wilfully and deliberately mis-read and fabricated the contents of the statement he was purportedly reading to the Grand Jury. Examination of the statement in question discloses that the United States Attorney added and interpolated each of the matters underlined in the quotation of the statement read to the Grand Jury, fabricating the contents by substituting the name of Benny Gentile in the place of the unknown male person who is set forth as the caller in the statement. There is not a scintilla of evidence in this case or elsewhere to show that Benny Gentile was in fact the unknown male caller

described in the statement. To make more glaring and apparent the misconduct of the United States Attorney in this connection, it appears that the informant, James Robbins, knew the voice of Benny Gentile, and testified that the caller was not Benny Gentile. To make more glaring the impact of this wrongful conduct before the Grand Jury, it appears that the United States Attorney added a complete new paragraph to the statement he was reading to the Grand Jury when he read the following:

> "Robbins stated that he knew Gentile's voice and told Gentile that he had no money to give him."

The statement of 2/11/72 has no reference whatever to the matter created by the United States Attorney and read to the Grand Jury with the fraudulent reference and implication that it was part of the written statement he was reading from.

Although the witness corrected a small part of the false statement read to the Grand Jury, the conduct of the United States Attorney cannot be condoned, and it must be presumed that in the procurement of the indictment before the Court, similar wrongful conduct was utilized in violation of the duty of the jury fairly, impartially and free of taint of any fraud or wrongdoing by the prosecutor.

After the revelation of the wrongful evidence introduced before the Grand Jury that founded the indictment was exposed, appellant Sacco moved the District Court to dismiss the indictment which was refused. (See Supp. Appendix Exhibit)

It is submitted that once a showing of wilful and intentional submission of false and fabricated evidence is established the law is well established that this is tantamount to a denial of due process of law, requiring dismissal of the indictment as violative of defendants Constitutional rights.

(h) THE FAILURE OF THE GOVERNMENT TO PRODUCE 3500 MATERIAL

18 U.S.C. Par. 3500 is a codification and modification of the Jencks decision which requires that the Government make available to counsel any statements, documents or writings of the witness which relate to the subject matter to which the witness has testified.

The statute provides that for failure of compliance with the statute,

> "the Court shall strike from the record the testimony of the witness, and the trial shall proceed unless the Court in its discretion shall determine that the interests of justice require that a mistrial be declared."

The Jencks case had made a mandatory requirement that the action be dismissed if the government should elect not to comply with the order to produce.

It should be noted that Par. 3500 (e) provides inter alia: The term 'statement'---means--(2) a stenographic, mechanical, electrical or other recording, or a transcription thereof---."

In the case at bar, two different types of recordations were testified to by Government witnesses:

(a) A recording device attached to the telephone of Robbins, one at home, and one in his place of business, both of which were activated by Robbins, and the telephone conversations would be recorded on a tape machine.

(b) a transmitter attached to the body of Robbins, which broadcast any conversation which Robbins had with persons in close proximity. This device broadcast to all FBI agents cars in the area and to two cars in the vicinity in which tape recording apparatus was located to record the broadcasts.

with respect to (a) Barbara Robbins testified at page 526 that in December 1971 wiretaps were placed on her telephones for a month and a half both at home and at the office. Three or four recordings were made at the office, none at home. At page 77 of the testimony the Government admitted that the tapes were used to refresh Robbins recollection. At page 695 Agent Reutter testified that on 1/5/72 he met Agent Bond to place tap onRobbins phone. At page 700.

Agent Reutter testified that he believed that recordings were made but he did not know how many.

With respect to (b) supra, referring to the transmittor, the following appears in the record: (p.65A)

> "MR. BRODERICK: With regard to the first witness tomorrow -- who placed a transmittor on the victum--
>
> "--we have tried to get a transcript--. They are, I would say, 99% unintelligible."

(p.73) "MR. SACCO: Your Honor, at this time, I would like to make an application to listen to those tapes. It is very well possible that these tapes could help me."

(p.79) "THE COURT:--and if we have to play the whole thing to the jury, we will do it and they will make the determination whether it is unintelligible or intelligible.

Thereafter, at page 83 a motion was made to dismiss for failure to disclose the tapes in the Bill of Particulars and in the representations to the defense and to the court. At page 86 the Court prevailed upon defendabt Sacco to state that he withdrew his application to hear the tapes.

But it should be noted that this withdrawel did not include the right to have the jury determine whether the tapes were intelligible.

At page 916 it appears from the testimony of Agent Walsh that this transmitter was used on two occasions, December 10 and January 7. At page 1192 Agent testified that the transmitter was working and that it transmitted the conversations between Robbins and Rhines on January 7.

This was submitted by Mr. Broderick as follows:(p.383)

> "---I do have one agent, though who overheard statements via the tape recording, of the meeting on January 7, 1972, Agent Robert Reutter, who overheard Robbins and the defendant Rhines talking, having a conversation about going to Mary Lea's, that Benny's was closed, something along those lines.
>
> Mr. BRODERICK: He overheard it through a tape recorder---not the tape recorder, the transmitter was coming into his room and he heard it."

With respect to (c) supra, it appears (p.695) that F.B.I. Agent Reutter met Agent Bond to place wire-taps on Robbins telephone both at home and at his place of business.

At page 700, Agent Reuter testified that the witness believed that recordings were made, but he did not know how many recordings were made.

At page 526, Mrs. Robbins testified as follows:

Q. "how long a period of time did this electronic equipment stay on your telephone at your home? From December 1971 untill when?---

A. Oh, maybe a month later, a month and a half.

Q. Do you know if any recordings were made from Peekskill Auto Disposal's yard,---?

A. Yes.

Q. How many recordings were taken from the corporation's phone, approximately?

A. Maybe three or four.

Bearing in mind that Mrs. Robbins was the Government's witness, that she testified she worked in the place where the recordings were made, it is possible that the Court could reconcile this testimony with the Government representation: (p. 739)

"THE COURT: The government states there were no wire-taps in this case."

However improbable the Court's action, the fact remains that the Court held that the Government had complied with the Bill of Particulars requisite, the discovery requirement, and refused to accede to defendant Sacco's demand at pages 804 and 839 that these tapes be produced, and examination be conducted about the taping and that the tapes be played to the jury.

Most significant, however, is the naive acceptance by the Court of the representations of the Government, when the record is replete with mis-statements of the government regarding the tapes and transmittals. To compound this error, when the witness Robbins testified that he heard the tapes and was able to identify his voice, the Court refused to allow the jury to hear what Robbins testified that he had heard on the tapes.

At page 1219, the Court stated: "I am going to prohibit questions of tape recordings."

An additional restriction was placed on defendant when the "Inadvertence of the Government to comply with the Bill of Particulars, the

obligation to turn over 3500 material and the obligation to make proper representations to the Court came to light all came to light in Exhibit 3507. Defendant Sacco noticed the reference to the Cassette recording of Arnow and asked the taps be played (p.337). Defendant repeated this request again at page 381 and at 1035 and at 1040, and was refused in each instance. Then, to compound this error, the Court refused to allow the witness Arnow to testify to matters on the taps, which would have impeached Robbins, who had testified to this conversation, which had been taped.

It should be apparent that the Court has unreasonably denied the defendant rights to introduce evidence and to cross examine as to matters which affect the most important aspects of this case.

Although Section 3500 requires that any and all statements or written matter of a witness be turned over after the witness has testified for purposes of cross examination for purposes of impeachment, and although failure to do so justifies dismissal of the indictment, the proceedings were marked by repeated, flagrant violations of this requirement.

At page 299-300, after the prosecutor had turned over the unsigned copies of statements and precipitated the Courts erroneous rulings that the author had to be recalled to the stand to use the statement, the government produced the signed statements in question at 299, 304.

At page 498 Sacco asks to examine Robbins again because of failure of Government to produce Arnow taps and Court denies although contents would impeach Robbins.

At page 539 FBI Agent Anadits testified & Sacco asked for 3500 material & the Court stated:

> "It has already been furnished to you as required by the Government." "In accordance with the law and the previous statements, you have given defense counsel all written statements & reports with respect to 3500 material."

Everyone protested they did not get the 3500 material (560) & then Broderick gives the report.

At page 651 Broderick states that he has furnished all 3500 material but photographs at 652 were not turned over.

At page 932-934 Broderick forgot to give 3501 of 12/13 statement interview with Robbins & Walsh*Sacco moves mistrial 937, which was denied.

Defendant Sacco submits to this Court that to deny an accused the opportunity to establish the facts of a case, to deny him the right to have evidence presented which could tend to show contridictions, errors, and direct violations of law, to deny an accused the opportunity to present this at trial before a jury, denies him due process of law, in fact denies him to a lawful and fair trial.

Defendant-appellant Sacco did not seek discretionary requests, but that which is mandatory according to STATUTE and standing case law. Appellant Sacco did not seek to burden the Court with back-tracking testimony but merely tried to bring out matters before the jury, as they truthfully took place. Appellant believes now, as he believed then, that these matters were most important to his defense, and his defense was denied in conflict with law.

ISSUE UNDER LIGHT (8)

THE CONVICTION SHOULD BE RECALLED UPON THE GROUND THAT APPELLANT SACCO WAS DENIED A FAST AND SPEEDY POST-TRIAL TAINT HEARING

That in March, 1972, appellant Sacco was indicted in the instant matter. On September 11, 1972, trial commenced but not after Sacco having raised the issue of illegal wiretapping and the government making the representation to the Court that there was none.

In June, 1976, 2½ years later, appellant Sacco was sentenced. See Issues # 1 & 6 for factural information.

While it may be argued by the government that appellant Sacco was afforded a speedy trial within his constitutional rights, they cannot argue that the post-trial "taint" hearing is not an integral part of the trial which still affords him the protection of the Sixth Amendment to the Constitution of the United States. ie., fast and speedy trial.

Appellant Sacco's alleged guilt in the instant matter has no bearing on the instant issue and once it has been established that he has been denied a fast and speedy disposition on the issue of "taint", the only possible remedy is dismissal. The facts in the instant matter show that the government did not exercise due dilligence in completing the post-trial "taint" hearing. The speedy trial guarantee recognizes that a prolonged delay may subject the accused to emotional stress that can be presumed to result in an ordinary person, from uncertainties and

the prospect of facing public trial or receiving a sentence longer than, or consecutive to the one presently serving which turned out to be true in the instant matter. Strunk v. United States, 93 S.Ct. 2260 (1973).

The right to a speedy trial is not a theoretical or abstract right, but one rooted in hard reality on the need to have charges promptly exposed. If the case which the prosecution calls on the accused to meet charges rather than rest on the infirmities of the prosecutor's case, as it is the defendant's right, the time to meet them is when the case is fresh. Stale claims have never been favored by the Law, and far less so in criminal cases. The right to a prompt inquiry into criminal charges is fundamental, and the duty of the charging authority is to provide a prompt trial. This is brought sharply into focus, when as in the instant matter, appellant Sacco was pressed for an early confrontation with his accusers and the government. Crowded dockets, the lack of judges and lawyers, and other factors, no doubt, make some delays inevitable. Here, however, no valid reason for the delay existed. It was exclusively for the convenience of the government. On the record, the delay, with its consequent prejudicies, was intolerable, as a matter of fact and impermissible as a matter of law.

In Barker v. Wingo, 407 U.S. 514, 92 S.Ct. 2182, 33 L.Ed.2d 109 (1972), the Court stressed the balancing test to determine if the defendant was deprived of a fast and speedy trial. Of these the most serious was the prejudice to the defendant. In the instant matter, the appellant Sacco demonstrated that the government's delay has caused him substantial prejudice, in that, six witnesses have died as more fully

in his motion filed on March 20, 1975.

There is also prejudice if defense witnesses are unable to recall accurately events of the distant past. Loss of memory, however, is not always reflected in the record because what has been forgotten can't really be shown. A good example of this is reflected in the testimony of defense witnesses and government witnesses who testified at the "taint" hearing conducted before Judge Fox in Tampa Florida.

The dilatory tactics of the prosecution and the New York State Authorities in making available the illegal tapes for defendants inspection is a procedure in diametric opposition to the principles of Due Process of Law expounded in opinions of the United States Supreme Court too numerous and well known to warrant individual citation. It is obvious that the dilatory tactics of the government and the New York State Authorities were abrogative of defendant's right to appeal. The procedure followed by the prosecution in the instant cause, and thus far partially sanctioned by the District Court, has made a mockery of the Supreme Court decisions that mandate fast and speedy trials and upon the grounds therein, the only remedy available once the determination is made that the fast and speedy post-trial "taint" hearing has in fact been denied is dismissal of the conviction.

ISSUE NUMBER NINE (9)

THE COURT ERRONEOUSLY CHARGED THE JURY AND WRONGFULLY ADVISED THE JURY AS TO THE LAW APPLICABLE

The Court violated appellant Sacco's rights under the Fifth Amendment and Rule 52(b) of the Federal Rules of Criminal Procedure "Plain Error" when it, (1) erroneously charged the jury as to a violation of state law; (2) erroneously charged as to the violation of the conspiracy counts, and; (3) erroneously charged the substantive counts with respect to (1) the Court charged as follows: (Tr. 1465):

> "And in this connection I charge that the law in New York State during the period of time referred to in the indictment, was that a person who was not a licensed lender could not enforce through civil judicial process, the collection of either the principal or the interest and a loan such as has been testified to in this case, if the interest was in excess of seven and half per cent per year. And to rephrase that, if a loan by a non-licenced lender is in excess of seven and a half per cent per year, said loan in New York State is void as a matter of law."

In the first instance, the government never tendered into evidence any statement, affidavit, official record or testimony by the custodian of records for the New York State Banking department to the effect that appellant Sacco had no license authorizing him or the other defendants to conduct business as licensed lenders pursuant to artical IX of the Banking Laws.

Sacco further argues that there is no presumption in, as set forth in Title 18 U.S.C. Sections 892(b) and the above charge is not the

law of New York State. The error of the Court's charge is apparent from its interpreation of the General Business Law of New York State which was submitted to the Court in a memorandum of law in support of the charge. The law of Usuary always was and still is a personal defense, which must be affirmatively raised and pleaded to be effective. If not raised, it is deemed waived as a matter of law.

Accordingly, an obligation is neither void or unenforceable merely becauseit is usurious. It is never void, and only becomes unenforceable when raised as an affirmative defense when the creditor seeks to enforce the obligation. Accordingly usuary is malum prohibitum not malum in se and does not fall within the requirement of the statute in the case at bar, which requires that the obligation in question be, 'inso facts' unenforceable. Usuary is not self-excuting as a defense. It is waived if not raised, and if raised, the obligation continues as such although the remedy is barred

Section §92(b) expressly requires "repayment- - would be unenforceable, through civil judicial processes against the debtor - -" as an indispensable prerequisite to the presumption being operative in the case before the Court.

In the case at bar, repayment is enforceable unless and untill the debtor invokes his personal defense of usuary, which may be waived. Accordingly, according to the laws of the State of New York, this obligation is enforceable, and does not fall within the statutory provisions which are conditions precedant to the right of the government to invoke the presumption provided by statute. No presumption arises as this factor is not present in the extension of credit in the case before the Court.

Count two (2) charged appellant Sacco & Gentile with making an extortionate extension of credit in May, 1970 in the amount of $1,000. Judge Gagliardi charged the full language of 18 U.S.C. § 892(b) which allows the government to make a prima facia case based upon inference when all the factors listed are met and told the jury that they could convict on Count 2 if all the factors were proved beyond a reasonable doubt. (Tr. 1465-1467):

> (Tr. 1466 14 thru 19):...'thirdly that the extension of credit that at the time the extension of credit was made the debtor reasonably believed either, a, one or more extensions of credit by the creditor had been collected by extortionate means, or the non-payment thereof had been punished by extortionate means or, b, the creditor had a reputation for the use of extortionate means to collect extensions of credit to punish the non-payment thereof.

Clearly, the above language gave the jury an alternate consideration that appellant Sacco in the past had used extortionate means to collect extensions of credit which was not warranted by the evidence. There was nothing in the case that justified that charge as to the alternative portion of the statute.

Appellant Sacco was charged in an eight count indictment for a violation of Title 18, Section 892, count two of the indictment, and counts three through eight charged a violation of 18 U.S.C.,Section 894, all in violation of the Extortionate Credit Transaction Act.

Section 894 provides " whoever makes any extortionate extention of credit, or conspires to do so, shall be fined not more than $10,000 or imprisoned not more than 20 years, or both."

The Court charged the jury at (T.T. 1463) that: "whoever makes any extortionate extension of credit shall be guilty of a crime." The Court then went on to charge the jury as to the essential elements required to convict per se, the Court stated the following: "the same provisions as I have given you with respect to count two insofar as what constitutes an extortionate extension of credit applies here and I am not going to repeat them because you have already heard those."

Ordinarily there would be nothing wrong with this sort of charge, but a prerequisite to this kind of charge would be that the defendant is charged with a violation of the same law and offence. It is therefore "plain error", Rule 52(b) for the Court to give this kind of charge for two unrelated crimes e.g., 892 as opposed to 894 two different statutes, and essential elements of the crime required to convict. Appellant Sacco charged in count two with a violation 892; an extortionate extention of credit by extortionate means. Two mutually exclusive offences. (T.T. 1468).

The Court further charged the jury on (T.T. 1474): " A defendant is guilty of a substantive offence charged if it was committed in furtherance of and doing the course of an unlawful conspiracy of which he was a member." This kind of charge is absolutly contrary to existing law, and not only again directed a verdict of guilty, but made the crime of conspiracy and the substantive offence mutually inclusive. See (Tr. 1489):

"In addition, I charge you that a conspiracy to commit a particular substantive offence cannot exist without at least the degree of criminal intent necessary for the substantive offense itself); e.g., U.S.

v. Pachico, 489 F.2d 554, 557; U.S. v. Lupino, 480 F.2d 720, 724-25; which held that inspite of their assumed interdependance they remain seperate and distinct offences.

The aforementioned charges were tantamount to the Court directing the jury to find appellant Sacco guilty of the offences charged. See, Hayward v. U.S., ___F.2d___(5th cir. 1972) Charges of this nature are wholly condemned as being a violation of a defendants Constitutional Rights to have a jury determine the facts and apply the law accordingly, without an invasion into their domain.

This Circuit is also no stranger to charges that permeate the entire concept of the judicial process, and denies a defendant a fair trial. See, U.S. v. Fields, 466 F.2d 119 (2nd. cir) where the Court states:

> "We regret that the need for a new trial because the evidence of the guilt of these defendants was substantial, but we do not fairly see how we can follow another course. This is not, after all, a case of nitpicking over nuances in a judge's charge; the errors go directly to the defendant's right to have the jury told what crimes he is actually being tried for and what the essential elements of those crimes are."

Another example of "plain error" is found on (T.T. 1477-78) footnote 1.

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1. (T.T. 1477-78)

" In order to find a defendant guilty of the conspiracy charged in the 3rd count of the indictment you must first beyond a reasonable doubt as follows: First, that some time between March 16, 1970, and the date of the filing of the indictment, which was March 23rd, 1972, an agreement existed between any of the defendants on trial and any other person whether on trial or not; second, that it was part of this agreement

Count three of the indictment charges appellant Sacco with a conspiracy to collect by extortionate means an extension of credit, not making an extortionate extension of credit as described by the Court. In substance, this kind of charge would require the jury to convict Sacco of the conspiracy if they found that he was guilty of count two of the indictment. Appellant Sacco duly noted a specific objection to this charge, and also objected to the charge in its entirety. (T.T. 1495 et seq).

In U.S. v. Howard, 506 F.2d 1131 the Court stated:

"...that if justice is to be done according to the rule of law, it is of paramount importance that the Courts instructions be clear, accurate, complete and comprehensive, particularly with the essential elements of the offence of the alleged crime that must be proved by the government beyond a reasonable doubt...the charge to the jury in the instant case is, to say the least, a far cry from the principles set-forth in Howard, supra. See also, U.S. v. Vaughan, 443 F.2d 92, 94-95 (2nd. cit. 1971).

The final contention of "Plain Error" dealing with the Courts charge to the jury, is the applicability of a New York State provision,[2] as being a controlling factor in a violation of Federal Law.

(1, cont'd) to do any of the following: A, to make extortionate extensions of credit by making loans to James Sonny Robbins, that is, to make a loan with the understanding of the creditor and debtor at the time of the making of the loan that delay in making repayment, or failure to make repayment could result in the use of violence or other criminal means to cause him harm that person, B, to advance money or property pursuant to a partnership agreement or a profit-sharing agreement or as a loan, investment or otherwise, to Frank Sacco or others with reasonable grounds to believe that it was the intention of Frank Sacco or others to use the means so advanced directly or indirectly for the purpose of making extortionate extensions of credit.

New York State General, Obligations Law (5-501-(1) & (5.511) provides:

> " 1. The rate of interest as computed pursuant to this title upon the loan or forbearance of any money, goods, or things in action, except as provided by law, shall be the rate prescribed by the banking board pursuant to section fourteen-a of the banking law, or if no rate has been so prescribed, six per centum per annum.

This statute has no place in the Federal criminal process, espically in view of the fact that it is totally contrary to the provisions of Title 18, Section 892 (b) (2) which states the following:

> "(B) In every jurisdiction within which the debtor, if other than a natural person, was incorporated or qualified to do business.

at the time the extension of credit was made.

> (2) The extension of credit was made at a rate of interest in excess of an annual rate of 45 per centum calculated according to the actuarial method of allocating payments made on a debt between principal and interest, pursuant to which a payment is applied first to the accumulated interest and the balance is applied to the unpaid principal."

The difference between the two is such that the 7½% required to be proven under that statute, requires a lessor burden of proof of the crime by the government, as opposed to the 45% required by ths statute. This requirement was fatal and prejudicial to all counts in the indictment. See, e.g., Title 18 § 894(c) which provides;

Footnote 2 (§ 891 (9)):

"State law, including conflict of laws, rules, governing the enforceability through civil judicial processes of repayment of any extension of credit or the performance of any promise given in consideration thereof shall be judicially noticed. This paragraph does not impair any authority which any Court would otherwise have to take judicial notice of any matter of State Law."..Added Pub.L. 90-321, Title II, § 202 (a), May 291 ,968, 82 Stat. 159.

"§ 894. Collection of extensions of credit by extortionate means

(c) In any prosecution under this section, if evidence has been introduced tending to show the existence, at the time the extension of credit in question was made, of the circumstances described in section 892(b) (1) or the circumstances described in section 892 (b)(2), and direct evidence of the actual belief of the debtor as to the creditor's collection practices is not available, then for the purpose of showing that words or other means of communication, shown to have been employed as a means of collection, in fact carried an express or implicit threat, the Court may in its discretion allow evidence to be introduced tending to show the reputation of the defendant in any community of which the person against whom the alleged threat was made was a member at the time of the collection or attempt at collection."

Added Pub.L. 90-321, Title II, § 202 (a), May 29, 1968, 82 Stat. 161.

The numerous amount of "Plain Error" violations alleged in the charge herein, violated appellant Sacco's rights to a fair trial on all counts in the trial, and the convictions on those counts should be reversed. See, e.g., U.S. v. Broadway, 477 F.2d 991 (5th cir. 1973); U.S. v. Abshire, 471 F.2d 116 (5th cir. 1972); U.S. v. Bryant, 490 F.2d 1372; U.S. v. Sutherland, 428 F.2d 1152; U.S. v. Smith, 433 F.2d 1266.

Appellant submits to this Court for all contained herein, for the direct violations of law and Constitutional Rights which are held by the appellant that a remedy is due.

PLAIN ERROR WAS COMMITTED IN THE COURSE OF SENTENCING PROCEDURE WHEREIN THE COURT RELIED ON A TAINTED PRE-SENTENCE REPORT WHICH WAS SUBMITTED BY THE NEW YORK AUTHORITIES

Appellant Sacco was sentenced on June 10, 1975, to the maxium sentence of 20 years in prison on each of the seven counts to run concurrently with each other but consecutively with his other outstanding sentences making it a total of 64 years to serve, all for loan-sharking.[1]

While appointed counsel was present in the courtroom, Sacco proceeded pro se and waived his right to counsel. The sentencing took place at approximately 5:00 P.M. which was swift, hectic and without Sacco having been given the opportunity to digest two seperate pre-sentence reports, that is one from the Federal Authorities and the other one from the New York State Authorities.

Sacco complained to Judge Gagliardi that the New York State pre-sentence report should not have been considered because it was filled with false information, false assumptions, conjecture, and surmised heresay. Although the Judge disclaimed reliance on the allegations of crimes not proven in the pre-sentence report, the prejudicial harm was already done as same can be readily seen by the maxium sentence have theretofore, been imposed.

Sacco was not given adequate time to effectively present his version of the inaccurancies of the New York State Pre-Sentence Report which he contested in the few minutes that he had to read it.

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1. U.S. District Court, Orlando, Fla.
U.S. District Court, Dist. Md.
State of New York

It is respectfully submitted that this Court has the authority to review sentences under certain limited circumstances. See, United States v Raymond Robin, 2nd Cir., 1977; also Townsend v Burke, 334 U.S. 736 at 740-1, 68 S.Ct. 1252; United States v Malcolm, 432 F. 2d 809, 814 (2nd Cir. 1970).

While it may be true that the sentence imposed upon Sacco in the instant matter was within the statutory maxium and the question of its legality cannot be entertained, it would nut be inappropriate for this Court to note with some concern, the particular severity of the sentence imposed which is tantamount to a life sentence on Sacco who is presently 51 years old, especially when there is such a disparity in the sentence's imposed on his co-defendants, Gemille & Rhines.

CONCLUSION

For any or all of the reasons set forth in all of the issues raised, it is respectfully urged that the judgment of conviction herein be reversed and either (1), a judgment of acquittal be ordered by this Court, or, (2), a new trial be directed.

Dated: May 19, 1977

Respectfully submitted,

Frank Sacco

Frank Sacco
Appellant-pro se